No. 14949

United States
Court of Appeals
for the Ninth Circuit

WILLIAM H. MARTIN, doing business as Martin's Auto Trimming, Inc., on behalf of itself and others similarly situated, Appellant,

vs.

T. C. COLEMAN ANDREWS, as the duly appointed and acting Collector of the Internal Revenue Service of the United States, and ROBERT A. RIDDELL, as Director of the Internal Revenue Service for the Southern District of California, Appellees.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif. —3-7-56

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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* Page numbers appearing at foot of page of original Transcript of Record.

In the District Court of the United States, Southern District of California, Central Division

No. 17411-PH

WILLIAM H. MARTIN, doing business as MARTIN'S AUTO TRIMMING, INC., on behalf of itself and others similarly situated,

Plaintiffs,

vs.

T. C. COLEMAN ANDREWS, as the duly appointed and Acting Collector of the Internal Revenue Service of the United States, and ROBERT A. RIDDELL as Director of the Internal Revenue Service for the Southern District of California, Defendants.

COMPLAINT FOR INJUNCTION TO RESTRAIN ASSESSMENT OR COLLECTION OF EXCISE TAXES

Come now the plaintiffs above named and for a first cause of action against the defendants and each of them, allege as follows:

I.

That the plaintiff Martin's Auto Trimming, Inc., during all of the time hereinafter mentioned was and still is a corporation, organized and existing under and by virtue of the laws of the State of California, with its principal place of business in the Southern District of California.

II.

That the plaintiff Martin's Auto Trimming, Inc.

brings [2] this action on its own behalf and on behalf of all others similarly situated. That said persons number approximately two hundred, and it is therefore impracticable to bring them all before this Court. That the same legal questions are involved as to all members of this class. That all of the persons and firms hereinafter referred to are similarly situated. That the character of the relief sought is applicable to all of the persons hereinafter referred to.

III.

That at all times herein mentioned plaintiffs and each of them were each engaged in the business of operating an automobile upholstery shop located in the Southern Central District of the State of California. That plaintiffs and each of them were engaged in making custom made to order seat covers by individual design and measurement for the respective automobiles of their customers. That plaintiffs made and sold custom made seat covers to individuals and to new and used car dealers. That none of the plaintiffs herein made any seat covers by pattern during any time referred to in this complaint, and none of the plaintiffs stocked any seat covers.

IV.

That the Collector of Internal Revenue of the United States Treasury Department, acting through his agents, has heretofore notified the plaintiffs and their attorney that the plaintiffs and each of them are liable for an excise tax of 8% of the gross amount of all sales of automobile seat covers, manu-

factured and sold by them between the year 1932 to and including August 18, 1952, to new and used car dealers.

V.

That the defendants are now threatening to assess and collect a tax from the plaintiffs and all other automobile upholstery shop owners in this district and in the State of California for any automobile [3] seat covers manufactured and sold by them to new and used car dealers prior to August 18, 1952 and to enforce against them such penalties as provided by law should they fail to pay said excise tax immediately.

VI.

That the defendants have assessed an excise tax against plaintiffs' firm for the manufacture and sale by them of custom made seat covers for the period August 1, 1950 to August 31, 1952 in the sum of $11,917.73. That a number of other auto upholstery shop owners for whom this action is being brought have received notice of proposed taxes to be assessed against them and others have been notified by the defendants that the defendants propose to assess a tax against them in a large sum of money for custom made to order auto seat covers manufactured and sold by them to new and used car dealers, for the period 1932 to August 18, 1952.

VII.

That the plaintiff Martin's Auto Trimming, Inc. alleges that it and the other auto upholstery shops for whom this class action is brought will suffer

irreparable injury and damage unless given relief against the enforcement of the tax assessments, as many of them are unable to pay the tax without great financial hardship to the continued safe operation of their businesses. That many of the trim shop owners will, in fact, be either forced to close their businesses if the defendants insist upon immediate payment of the aforementioned tax and others will be required to either mortgage their homes or make loans to obtain the money to do so.

VIII.

That none of the plaintiffs have collected any excise tax from their customers for the period mentioned hereinabove for any custom made seat covers made by them during this period of time. [4]

IX.

That many of the plaintiffs herein, as a result of their failure to have collected any excise tax from their customers are now without sufficient funds of their own to pay these taxes at this time without grossly and seriously depleting their working capital. That many of the plaintiffs would be subjected to oppression and injustice in that they would actually be forced to close down and liquidate their business, if defendants insist upon payment of the tax, inasmuch as they actually do not have the funds to pay such a tax at this time.

X.

That the equity jurisprudence of this Court is invoked to prevent a multiplicity of suits by such

of the auto upholstery shop owners who may under threat of levy and seizure of their business, borrow the money to pay the tax. That if these plaintiffs are required to pay the tax and are compelled to resort to a court of law to recover the amount so paid, the business of this Court will be obstructed by the number of cases of the same character.

XI.

Section 3403 of the Internal Revenue Code of the United States, upon which the defendants rely for the assessment of the tax against plaintiffs provides in part as follows: "There shall be imposed upon the following articles sold by the manufacturer, producer or importer, a tax equivalent to the following percentages of the price for which so sold; (c) parts or accessories (other than tires and inner tubes) for any of the articles enumerated in subsection (a) or (b), 2 per centum."

XII.

That Section 3403(a) refers to automobile truck chassis, automobile truck bodies and tractors and, Section (b) refers to other automobile chassis and bodies and motorcycles (including in [5] each case parts or accessories therefor sold or in connection therewith or with the sale therewith except tractors, 3%. A sale of an automobile shall, for the purposes of this subsection, be considered to be a sale of the chassis and of the body.

XIII.

Section 316.2 of the Internal Revenue Code reads

"the taxes on the sale or use of articles covered by these regulations were originally imposed by title 4 of the Revenue Act of 1932. The applicable provisions of the Revenue Act of 1932 were superseded effective March 1, 1939 by provisions of the Internal Revenue Code.

XIV.

That Section 3403(c) was amended in 1951 to provide for a tax of 8 per centum up to and including April 1, 1954.

XV.

That the defendants have interpreted accessories to include automobile seat covers.

XVI.

That between the period of 1932, the effective date of the Revenue Act of 1952 and until the 18th day of August, 1952 the defendants herein by and through their duly authorized officials acting within the scope and course of their employment with the defendants did make and issue a number of official regulations and opinions on various successive dates, both orally and in writing, to various of the plaintiffs, uniformly holding and stating that no excise tax attaches to any auto seat covers made by the plaintiffs if made by individual measurement and not by pattern and without regard as to whether the seat covers were made and sold to either individuals or to new and used car dealers.

XVII.

That the aforesaid regulations and opinions were rendered by officials of the defendants while in the employ of the defendants [6] and while acting within the limits of authority lawfully conferred upon them by the defendants and whose duty it was to interpret and enforce the excise tax laws concerning automobile seat covers.

XVIII.

That the plaintiffs and each of them in good faith at all times herein mentioned relied upon these representations and opinions.

XIX.

That the aforementioned representations and opinions were made by these officials to the plaintiffs intending that the plaintiffs and each of them rely thereon. That plaintiffs did rely thereon, and in the operation by them of their respective business, did not include in any sales made by them any excise tax for any seat covers made to measure by them, whether made for individuals or for new or used car dealers for the period prior to August 18, 1952.

XX.

That plaintiffs were ignorant of defendants' intention to later assert for the first time on and after August 1952, that the plaintiffs were to be subject to and liable for an excise tax retroactively on any automobile seat covers made by them for new or

used car dealers, even though made to measure and immediately installed and not placed in stock.

XXI.

On August 18, 1952 the defendants for the first time since the enactment of the Revenue Act of 1932 did issue and publish a notice stating that if a manufacturer furnishes material and makes automobile seat covers, whether according to pattern or by individually measured jobs, all sales of such seat covers would be henceforth taxable under Section 3403(c) of the Internal Revenue Code, as amended, notwithstanding any previous regulations by the [7] defendant to the contrary.

XXII.

That the defendants are now seeking to impose upon plaintiffs and each of them payment of an excise tax for all automobile seat covers manufactured and sold by them on individually measured jobs and not out of stock on sales made to new or used car dealers prior to August 18, 1952.

XXIII.

That by reason of the opinions and regulations issued by the defendants' officials, as aforesaid, the defendants are now estopped to assess a tax against plaintiffs for any automobile seat covers manufactured and sold by them to new or used car dealers prior to August 18, 1952, when such seat covers have been made by individual design and not by

pattern and were immediately installed and not taken from stock.

XXIV.

That the amount in controversy herein exceeds the sum of $3,000.00.

XXV.

That T. Coleman Andrews is the duly appointed and Acting Collector of Internal Revenue of the United States and Robert A. Riddell is the District Director of the Internal Revenue Service for the Southern District of California.

XXVI.

That unless injunctive relief will be granted plaintiffs will suffer irreparable injury and damage and they will be subjected to oppression and injustice.

XXVII.

This action arises under the Internal Revenue Codes Title 26.

For a Second, Separate and Distinct Cause of Action the Plaintiffs Allege as Follows: [8]

I.

Plaintiffs incorporate herein paragraphs I to XV inclusive of the first cause of action, with the same force and effect as if fully set forth herein, also paragraphs XXIV to XXVII.

II.

That over a period of twenty years the defend-

ants herein consistently issued various opinions and regulations both oral and in writing to various of the plaintiffs, interpreting section 3403 of the Revenue Act as applicable only to manufacturers of automobile seat covers and who, in fact, manufactured the seat covers by patterns and placed them in stock and in like manner held that this section did not apply to automobile upholstery shops who made seat covers by individual measurement immediately tailored to the respective automobile.

III.

That the plaintiffs and each of them are not manufacturers but are automobile upholsterers. Plaintiffs do not cut any material for seat covers by pattern, but each automobile seat cover job is individually tailored to the measurement of the automobile upholstery in each case.

IV.

That plaintiffs did not include in their selling price any part of the manufacturer's excise tax for any period prior to August 18, 1952, in the sale of automobile seat covers by them individually tailored by measurement and immediately installed in that they relied upon the rulings and opinions issued by the defendants.

V.

The predecessor of the defendant made and published an official regulation number 46 Article 36 also known as S.T. 582, which provides as follows:

"Repairs on automobiles performed in [9] a repair shop, such as painting, auto upholstery, changes in, or replacements of woodwork and repairs to finders and bodies are deemed to be in the nature of general repair work rather than articles sold and are not subject to tax under section 606 of the Revenue Act of 1932."

VI.

The ruling aforementioned was a regulation promulgated according to statute and under the authority vested in the defendants. That subsequent to the publication by the Internal Revenue Department of the aforementioned regulation, various officials in the employ of the defendants did thereupon interpret said regulation to exempt from the liability of an excise tax all automobile seat covers individually tailored by measurement to the respective automobiles and immediately installed, made by auto upholstery shops.

VII.

That the defendants, on August 18, 1952, made and issued a new regulation described as Regulation 46 (1940) Section 316.55 S.T. 944 reading as follows:

"76,339 ST 944—Excise Tax—sale of automobile seat covers by the manufacturer is taxable, including those produced according to individual design and measurement for the consumer—as to sales that were previously ruled nontaxable the new ruling will not apply to sales prior to August 18, 1952. (See also 38,568)."

Application of the tax, imposed by section 3403 (c) of the Internal Revenue Code, as amended, to the sale of automobile seat covers by a manufacturer who furnishes the material therefor and produces them for the consumer thereof according to individual design and measurement.

Section 3403(c) of the Code, as amended, imposes, effective November 1, 1951, a tax of 8 percent on the sale by the manufacturer [10] of parts or accessories for vehicles taxable under subsection (q) and (b) of section 3403 of the Code, as amended, except that on and after April 1, 1954, the rate of tax shall be 5 per cent. Seat covers for automobiles are considered to be parts or accessories within the meaning of section 3403(c) of the Code, as amended and sales thereof by the manufacturer are subject to tax.

The Bureau has issued rulings heretofore, that the only circumstances under which the tax does not apply to sales of seat covers by a manufacturer, is where the seat covers are individually designed, cut tailored, and fitted by the manufacturer to the automobile belonging to the person who contracts for the performance of such operation, and such person is the consumer of the seat covers. Such rulings provided, however, that the sale of seat covers, similarly produced, to a dealer in new or used automobiles is not a sale for consumption but one for resale, and that the tax attaches to the manufacturer's sales thereof.

Upon reconsideration of the matter, the Bureau

is now of the opinion that where a manufacturer furnished the material and produces automobile seat covers for the consumer thereof, according to individual design and measurement, the sale by the manufacturer of such seat covers is taxable under section 3403(c) of the Code, as amended, regardless of whether they are installed by the manufacturer or by other persons.

The Bureau has issued rulings, as stated above, that sales by a manufacturer of seat covers, produced according to individual design and measurements, to a dealer in new or used cars are not considered sales for consumption, and are subject to tax. The taxability of such sales is not affected by the ruling herein, and tax continues to attach, as in the past to such sales.

Because of the past rulings of the Bureau concerning the non-application of the tax to automobile seat covers which are [11] produced according to individual design and measurement for the consumer thereof, it has been concluded that, under the authority contained in section 3791(b) of the Code, the ruling set forth herein relating to seat covers so produced will not be applied retroactively with respect to sales of such seat covers prior to the date of this bulletin, except that any tax which has been paid on the sale of such seat covers will not be refunded, unless in a particular case it is established to the satisfaction of the Commissioner, as required under section 3443(d) of the Code, that the manufacturer, by reason of relying on an exist-

ing ruling that the sale of seat covers so produced was not taxable, did not include in his price any part of the manufacturers' excise tax which he may have subsequently paid on the sale (S.T. 944 1952-17-13906).

VIII.

That in the aforementioned regulation the defendants have now prescribed that automobile seat covers made according to individual design and measurement will be subject to excise tax on and after August 18, 1952, but that said regulation will not apply to sales prior to August 18, 1952, made to consumers.

IX.

The defendants have now determined that only automobile seat covers individually designed, cut, tailored and fitted by the manufacturer to the automobile belonging to the person who contracts for the performance of such operation and when such person is the consumer of the seat cover is to be exempt from any excise tax prior to August 18, 1952, but that any auto seat covers made by plaintiffs for new or used car dealers, even though individually made to design and measurement were and are, nevertheless, subject to excise tax.

X.

That many of the plaintiffs in this action, including plaintiff, Martin's Auto Trimming, Inc., are primarily engaged in making [12] seat covers and other upholstery work for new and used car dealers

rather than the general retail trade although they do in fact do work for both. That there are many auto upholstery shops who cater only to retail customers and do not render any work for new or used car dealers.

XI.

That the determination of August 18, 1952, S.T. 944, that auto seat covers tailored to measure by individual design and sold to the person who contracts for the seat covers is not subject to a tax retroactively but that such sales are subject to excise tax on sales made on and after August 18, 1954, and that auto seat covers made by individual design and not by pattern for a dealer, in new or used automobiles is subject to an excise tax retroactively prior to August 18, 1952, was arrived at by the defendants by fundamental wrong principles and is arbitrary and confiscatory and constitutes a denial of the equal protection of the law as provided for by the Fourteenth Amendment to the Constitution of the United States, by exempting the tax on sales to retail customers when the retail customer personally contracts for the purchase of the seat covers, but applying the tax on such sales if the sale is arranged by or made through a new or used car dealer.

XII.

That in those instances where the plaintiffs have made seat covers for new and used car dealers which is the subject matter of this proceeding, invariably the dealer has in the first instance already

sold the automobile in question to a retail customer and has either as an inducement to the customer to purchase said automobile or by way of a separate sales transaction made the necessary arrangements with the plaintiffs to make and install a set of seat covers for the automobile purchased by the retail customer from them. That in this connection the new or used car dealer is simply [13] acting as an agent for the retail customer and, in fact, in many instances the retail customer himself appears at the place of business of the plaintiffs and selects the materials from which the seat covers are to be made. That there is, in fact, therefore, no reasonable basis upon which to distinguish a sale to a retail customer when such sale is arranged through a new and used car dealer or when the retail customer appears in person at plaintiff's place of business and makes all the necessary arrangements and the purchase himself.

XIII.

That the determination exempting those automobile upholstery shops from the payment of an excise tax for automobile seat covers individually made by them for the consumer of the seat covers and in turn holding that the plaintiffs who are engaged in making automobile seat covers for new or used car dealers, as aforesaid, are subject to an excise tax is a denial of the equal protection of the law and is in violation of the Fourteenth Amendment to the Constitution of the United States.

For a Third, Separate and Distinct Cause of Action, Plaintiffs Allege as Follows:

I.

Plaintiffs incorporate herein paragraphs of the first cause of action with the same force and effect as if fully set forth herein. (Paragraphs I to XV and XXIV to XXVII.)

II.

That the plaintiffs all of the time herein mentioned were not manufacturers, producers or importers of automobile seat covers; but are automobile upholsterers. That they do not use any patterns such as are customarily used by automobile seat cover manufacturers. That each seat cover made by them is made by individual design and is tailored to the upholstery of the respective automobile. [14] That each seat cover is individually, cut, tailored and fitted by the plaintiffs to the automobile upholstery and immediately installed. That section 3403 of the Internal Revenue Code of the United States upon which the defendants rely for the assessment of a tax against the plaintiff is applicable to accessories manufactured and sold by manufacturers, producers or importers. That the plaintiffs herein and each of them are neither manufacturers, producers or importers of automobile seat covers. That the transactions in which these plaintiffs are engaged is one involving the sale of labor and material and not the sale of an accessory within the meaning of said section.

For a Fourth, Separate and Distinct Cause of Action, the Plaintiffs Allege as Follows:

I.

Plaintiffs incorporate herein paragraphs I of the first cause of action with the same force and effect as if fully set forth herein. (I to XV and XXIV to XXVII.)

II.

That heretofore a regulation was made by the defendants known as Regulation 46, S.T. 928, holding that glass cut to automobile pattern pursuant to a customer's order, if installed by the person who cuts such glass, that the excise tax will not attach for the reason that the transaction is deemed to be one involving the sale of labor and material and not the sale of an automobile part or accessory.

III.

That in making a determination that automobile seat covers made by individual pattern and designed and installed by the person who makes the same are subject to excise tax and is not one involving the sale of labor and material as was determined by Regulation 46 S.T. 928, when applied to glass for automobiles, is discriminatory and arbitrary and is a denial to the plaintiffs of the equal protection [15] of the laws afforded by the Fourteenth Amendment of the Constitution of the United States, in that it discriminates against the plaintiffs on the identical method of operation in favor of shop owners en-

gaged in the business of installing glass on automobiles.

Wherefore, plaintiffs pray judgment for a decree of this Court that the defendants and each of them, their agents, servants, employees and attorneys be perpetually enjoined and restrained from the collection of any excise tax levied and assessed by the defendants against the plaintiffs or either of them for automobile seat covers made by them prior to August 18, 1952 which they have designed, cut, tailored and fitted to the automobiles and immediately installed, on sales made to new or used car dealers or consumers.

That the defendants be decreed by a mandatory order of this Court to pay back the tax which has been collected by the defendants to the persons who paid the same, in the event such payment has been made at the time of the trial of this case. In the meanwhile and during the pendency of this action, a temporary injunction be granted commanding the defendants and each and everyone of them, their agents, servants, employees and attorneys to absolutely desist and refrain from assessing or proceeding with the assessment or from collecting or attempting to collect any and all taxes levied or assessed by the Collector of Internal Revenue Department against the plaintiffs or either of them, for custom made to order seat covers made and sold by them to new and used car dealers prior to August 18, 1952, or to the direct consumer thereof, or from collecting or attempting to collect the tax

mentioned and described in this complaint, and from enforcing or attempting to enforce the same in any way whatever, and for such further judgment of payment in the premises as may be just and equitable, including the cost of suit.

/s/ PHILL SILVER,
Attorney for Plaintiffs [16]

Duly Verified. [17]

[Endorsed]: Filed Oct. 29, 1954.

[Title of District Court and Cause.]

MOTION FOR PRELIMINARY INJUNCTION

Come now the plaintiffs, above named, and move the Court for a preliminary injunction in the above entitled cause, enjoining the defendants, their agents, servants, employees, and attorneys, from assessing or proceeding with the assessment or from seizing, taking by distraint and selling any of the goods, chattels, effects, including stocks, securities, bank accounts, evidences of debt or other personalty, and real property of the above named plaintiffs.

The grounds in support of this motion are as follows:

1. That heretofore the Commissioner of Internal Revenue made an assessment of excise taxes under Section 3403(b) of the Internal Revenue Code, as amended, in various amounts against plaintiffs and

notified various other of the plaintiffs that [27] defendants proposed to make assessments of taxes in large sums of money;

2. That the plaintiffs are not subject to such taxes, nor interest or penalties which may be added thereto;

3. That the plaintiffs do not have the funds with which to pay the greater portion of such taxes, interest, and penalties;

4. That if the Director of Internal Revenue for the State of California whose duty it is to collect such taxes, proceeds to do so by distraint or levy, the warrant could not be satisfied, inasmuch as many of the plaintiffs do not have the funds to pay these taxes;

5. That any attempt by defendants to collect the tax by levy or distraint would prove to be arbitrary and oppressive, work a complete cessation of the business of the plaintiffs and completely destroy the same, ruin them financially, and inflict losses for which they would have no remedy at law;

6. That by reason of such special, exceptional and extraordinary facts and circumstances, Section 3653 of the Internal Revenue Code does not apply;

7. The plaintiffs have no adequate remedy at law, in that they have no alternative but to pay the tax levied under Section 3403(b) and sue for a refund, in order to have the validity of the assessment litigated;

8. That the defendants, their agents, employees,

attorneys, and servants will immediately seize upon distraint and sell all of the personal and real property of the plaintiffs, unless they are, by order of this Court, restrained;

9. Immediate and irreparable injury, loss and damage will result to the plaintiffs by reason of the threatened action of the defendants, as more particularly appears in the verified [28] complaint and affidavit of the plaintiff filed herein.

Wherefore, plaintiffs move that a preliminary injunction be issued by this Court, in accordance with the prayer in the verified complaint, restraining defendants, their agents, employees, servants and attorneys and all persons acting by, through or under them, or either of them, or by or through their order from making any further assessments against plaintiffs and from levying upon or seizing upon distraint and selling any of the real or personal property of the plaintiffs or either of them.

/s/ PHILL SILVER,
Attorney for Plaintiffs [29]

[Endorsed]: Filed Oct. 29, 1954.

[Title of District Court and Cause.]

AFFIDAVIT

State of California,
County of Los Angeles—ss.

William H. Martin, being first duly sworn, deposes and says: That he is the president of Martin's Auto Trimming, Inc., a corporation. That Martin's Auto Trimming, Inc. has been incorporated under the laws of the State of California, is duly licensed and has its principal place of business in the Southern District of California.

That Martin's Auto Trimming, Inc. is engaged in the automobile upholstery business, primarily servicing new and used car dealers. That the major portion of its business is confined to new and used car dealers and a minor portion of its business to [30] the general public at large.

That some time in 1936 your affiant opened an automobile upholstery shop at 2329 South Figueroa Street in Los Angeles, California, under the fictitious name of Martin Auto Works. That at the time affiant commenced operation, your affiant personally visited the office of the Bureau of Internal Revenue in Los Angeles and upon inquiry was directed to one of the officials in charge of the office. Your affiant thereupon asked this official as to whether an excise tax was applicable on custom made to order seat covers made to individual measurement and tailored to the upholstering of the cars by affiant. That your affiant was thereupon

informed by this official, who appeared to be in charge of the Los Angeles Bureau of Internal Revenue, Excise Tax Division, that an excise tax was only applicable to ready made seat covers if cut by patterns and if carried in stock as a finished product, and that there was no excise tax applicable to any seat covers made to individual measurement and immediately installed on the upholstery of the automobiles.

In 1945 your affiant changed from Martin Auto Works to Martin's and moved to 1243 South Alvarado Street, Los Angeles, California. That shortly thereafter and in that same year your affiant again visited the Los Angeles Bureau of Internal Revenue to review the subject of excise tax on seat covers made by affiant. On this occasion affiant was referred to Mr. Herbert G. Barnett, who was an official in the employ of the Los Angeles Bureau of Internal Revenue. That your affiant explained to Mr. Barnett that he was engaged in the automobile upholstery business with the major part of his business new and used car dealers; that all seat covers which they made were made by them on their own premises and were made to the individual measurement of each automobile and were immediately installed on the upholstery of the respective automobile. That your affiant informed Mr. Barnett that he had previously been [31] advised by the Los Angeles office of the Internal Revenue Department in 1936 that there was no excise tax on custom made to order seat covers and wanted to know if there was any change in the law. Mr. Bar-

nett stated to your affiant that there had been no change in the law and that an excise tax was only applicable on auto seat covers manufactured by patterns as a finished seat cover and carried in stock, and that there was no excise tax on custom made to order seat covers. That thereupon your affiant continued the operation of his seat cover shop without including in the selling price any excise tax for any automobile seat covers made by him or his employees tailored to the individual automobiles of his customers. That he continued this method of operation until approximately September of 1952 when your affiant received a notice in the mail from the Bureau of Internal Revenue stating that commencing August 18, 1952, all sales of seat covers were to be taxable thereafter, regardless of whether they were installed by the manufacturer or by other persons. A copy of this ruling is hereby attached and marked "Exhibit A" and incorporated and made a part of this affidavit.

That at all times referred to in plaintiffs' complaint, your affiant as well as of all of the plaintiffs for whom this action was brought, were engaged in operating custom made to order auto upholstery shops and were not operating as manufacturers of automobile seat covers. That each seat cover which they made was made by them on each individual automobile by individual design and not by pattern and was immediately tailored to the upholstery of the automobile. That all the work performed by the plaintiffs comes under the category of auto upholstery and not under the category of manufac-

turing. That none of the plaintiffs make any seat covers by pattern nor did they stock any seat covers at any of the times involved herein. This distinction was recognized by the predecessors of the defendants herein in the sale of bulk [32] yardage from rolls for an official regulation was made and published by the predecessor of the defendants herein known as Regulation 46 Article 41 S.T. 824, which reads as follows: "If the part or accessory is cut or produced from lengths or rolls of material for immediate use by a repairman in a repair job on which he is then working, the sale thereof by the jobber or dealer to the repairman is deemed to be a sale of material not subject to tax. If, however, the jobber or dealer transforms lengths of rolls of material into parts or accessories and places the finished articles in stock for future use or disposition, he thereby becomes the manufacturer of such articles and his subsequent sale or use thereof is taxable under Section 606 of the Revenue Act of 1932."

That for twenty years the defendants herein and their predecessors interpreted the aforementioned regulations and section 3403(c) of the Internal Revenue Code to require the payment of an excise tax only on auto seat covers manufactured and placed on shelves for stock and that seat covers made to order installed immediately on automobiles were not subject to excise tax. That attached hereto and made a part hereof and marked "Exhibit B" is a letter dated October 14, 1947 on the official stationery of the Treasury Department directed to Black-

wood Auto Seat Covers, one of the plaintiffs herein and signed by Leo C. Reusche, who was then Assistant Chief Miscellaneous Tax Division of the Internal Revenue Service. That in this letter Mr. Reusche stated the following:

"As the manufacturer of seat covers you are required to keep adequate records on your sales. The manufacturers' tax of 5 per cent on your net selling price applies under Section 3403(c) to sales of seat covers from your shelves, made up by you as stock. If, as it appears, you have car owners bringing in cars requesting you to make to order seat covers from materials you stock, which you install in their cars, no tax applies." [33]

That in 1948 an agent then in charge of the Los Angeles Internal Revenue Service, Excise Tax Division, did make similar representations to one Rubie Gilbert, a public accountant. An affidavit made and executed by Rubie Gilbert on behalf of these plaintiffs is attached hereto, marked "Exhibit C" and is incorporated herein by reference. That as appears from said affidavit, Rubie Gilbert was informed by the Los Angeles Internal Revenue Bureau that there was no excise tax collectible on any custom made to order seat covers, whether made for retail customers or wholesale customers, but that the only tax collectible would be on seat covers manufactured and placed in stock.

That attached hereto is an affidavit made and executed by Louis Lampert, who is a certified public accountant, which recites that he, on or about

February 1950 telephoned the Los Angeles Internal Revenue Bureau, Excise Tax Division; that he was connected with the head of the Excise Tax office of the Los Angeles Internal Revenue Bureau and that he was informed that the Los Angeles Internal Revenue Bureau had received word from Washington that there was no tax to be collected on custom made to order seat covers, but that the only excise tax to be collected was on the wholesale manufacture of auto seat covers in the package, that is to say, box covers that were shipped out for installation by the customers themselves, such as seat covers being shipped to a car dealer where the car dealer maintains his own installation facilities, but that any auto seat cover manufactured and installed on the premises and on the car whether the customer be a new or used car dealer or a retail customer, that there would be no excise tax chargeable or payable. This affidavit is incorporated herein by reference and marked "Exhibit D".

Your affiant states that various agents in the employ of defendants and their predecessors in office, acting in the course of their employment, have consistently prior to August 18, 1952, [34] represented to the plaintiffs by letter and by oral statements that there was no excise tax to be charged or collected by them for any automobile seat covers custom made by them to individual measurement, and that there was an excise tax on automobile seat covers if manufactured by patterns and placed in stock for future sale. As hereinabove previously alleged, neither the plaintiff nor any of

the plaintiffs have at any time manufactured seat covers for stock, but have tailored each respective seat cover to the individual measurement of the individual automobile and have in each instance made an immediate installation on these respective automobiles. That these plaintiffs and your affiant relied in good faith upon the opinions and statements made and issued by the agents of the defendants and their predecessors, as hereinbefore set forth, and did not include in their selling price an excise tax for any seat covers made and installed by them at any time prior to August 18, 1952.

Section 379(b) of the Internal Revenue Code provides as follows: Retroactively of Regulations or Rulings. The Secretary or the Commissioner, with the approval of the Secretary, may prescribe the extent, if any, to which any ruling, regulation or Treasury decisions relating to the Internal Revenue laws, shall be applied without retroactive effect. That the notice hereinabove referred to, as plaintiffs' "Exhibit E" entitled Modification by the Bureau of the Internal Revenue relative to custom made seat covers effective date August 18, 1952 is an official determination by the defendants herein that there is and was no excise tax on custom made to order seat covers prior to August 18, 1952 on sales made to "consumers," and that effective on and after August 18, 1952 there was to be an excise tax on seat covers whether manufactured according to pattern or by individual measured jobs and regardless of whether they are installed or manufactured by other persons, but that such tax would not

apply [35] to sales made to the consumer prior to August 18, 1952, but would apply to sales made to new or used car dealers prior to August 18, 1952. Your affiant states that this determination making effective an excise tax on auto seat covers, effective on and after August 18, 1952 regardless of how the seat covers were manufactured, to wit, whether by pattern or individual design, but determining that such tax would not be applied retroactively on sales made to consumers but would be applicable retroactively on sales made to new and used car dealers is an attempt on the part of the defendants to repudiate the many opinions made by defendants' agents wherein these agents led affiant and plaintiffs to believe that there was no tax applicable on such sales. Affiant states that such a determination and ruling is discriminatory, arbitrary and unreasonable and constitutes a denial to these plaintiffs of the equal protection of the law as provided for by the Fourteenth Amendment of the Constitution of the United States.

Your affiant states that he has been handed a document by the agents of the defendants entitled Proposed Assessment, wherein the defendants propose to assess a manufacturer's excise tax against Martin's Auto Inc. in the sum of $11,917.73, for the manufacture and sale by them of custom made seat covers for the period 1950 to August 18, 1952. That other plaintiffs herein have likewise received notices from the defendants herein that defendants propose to assess excise taxes against them for the period 1950 to August 18, 1952 for the manufacture

and sale by them of custom made seat covers, to new and used car dealers.

The defendants are discriminating against affiant and all plaintiffs, as well as retail customers who have purchased their seat covers through a dealer in favor of auto seat cover shops, which during this period of time have been engaged solely with the manufacture of auto seat covers directly for the consumer or the retail customer and not for dealers. That actually there is no legal [36] distinction or basis in law for an excise tax to be assessed against seat cover shops for seat covers made by them for new and used car dealers while sales made by other shops for retail customers are considered exempt from such tax. Actually in those instances where the sale is made to a new or used car dealer, a sale of the seat cover has been made by the dealer to a retail customer and the dealer merely acts as an agent in arranging for the plaintiff to pick up the automobile at the dealer's place of business. In many instances the retail customer of the dealer has in fact visited the place of business of the plaintiffs and made his own selection of the materials, and in many other instances the seat covers have been actually given by the dealer to the purchaser of the automobile in question as a gift and at no charge to the customer.

The regulation made by defendants assessing a tax on custom made to order seat covers for the period prior to August 18, 1952, when the seat covers are sold through a new or used car dealer but exempting the same tax when the retail cus-

tomer (consumer) makes the purchase himself at the place of business of the plaintiffs is a denial to these plaintiffs of the equal protection of the laws afforded to them by the Fourteenth Amendment of the Constitution of the United States, in that it discriminates against plaintiffs in favor of auto seat cover shops who cater only to retail customers, or who have made sales directly to the consumer. Said regulations also discriminates in favor of retail purchasers who make their purchase of seat covers at the place of business of a seat cover shop and discriminates against persons who purchase auto seat covers through a dealer agency, and also discriminates against dealers who purchase seat covers on behalf of retail consumers.

That in 1940 an official regulation was made and published by the predecessors of the defendants known as Regulation 46 S.T. [37] 928 (1940) which provides that glass cut to automobile pattern pursuant to a customer's order and which is installed by the person who cuts such glass is not subject to the manufacturer's excise tax, for the reason that the transaction is deemed to be one involving the sale of labor and material and not a sale of an automobile part or accessory.

The regulation made by the defendants assessing a tax on custom made to order seat covers for the period prior to August 18, 1952 and determining that such seat covers are subject to a manufacturer's excise tax is a denial to these plaintiffs of the equal protection of the laws afforded to them by the Fourteenth Amendment of the Constitution

of the United States, in that it discriminates against plaintiffs in favor of automobile glass shops who cut and install glass for automobiles. That glass for automobiles is in the same merchandise category as seat covers for automobiles and if a seat cover is an accessory within the meaning of Section 3403 of the Internal Revenue Code, a fortiori, glass for automobiles is an accessory. And if a sale of glass cut to an automobile pattern and installed on an automobile constitutes a transaction involving the sale of labor and material and not the sale of an automobile part or accessory by the same reasoning seat cover material cut and installed on the upholstery of an automobile is one involving the sale of labor and material and not the sale of an automobile part or accessory. Your affiant states that to cut, measure, sew and install a custom made set of auto seat covers consumes approximately four hours of the time of an experienced upholstery trimmer. That this labor constitutes the major portion of the cost of a custom made seat cover, involving approximately four hours labor of an employee's time out of an ordinary eight hour operating day. That where the owner of the shop performs this labor it also includes 50% of his overhead for one half of a day [38] is consumed in the one seat cover job. If an employee cuts, sews and installs the seat cover, as well as dismantles the upholstery and replaces the upholstery in the car 50% of the overhead attached to the employee is included in that transaction.

That not one of the plaintiffs prior to August

18, 1952 were at any time notified by the defendants or defendants' predecessors that there was an excise tax attachable to custom made to order covers whether made for new or used car dealers or for retail consumers directly. Affiant states that it was the established usage and custom in the State of California for the automobile upholstery shops not to charge an excise tax on custom made to order seat covers prior to August 18, 1952. That the basis of this usage and custom followed and was as a result of the many opinions, both oral and in writing issued by the defendants and their predecessors to various persons who made inquiry of them concerning such a tax. That this information became common knowledge in the trade and was circulated by word of mouth among the trimmers and by the salesmen of the auto upholstery jobbers.

Affiant's attorney prepared a questionnaire which was mailed by him to all of the plaintiffs in this action submitting to them various questions pertaining to the issues in this case. That included in this questionnaire the following questions were asked of them:

Q. During the period prior to August 15, 1952, did you make and install custom made to order auto seat covers for new or used car dealers?

Q. If your answer to the previous question is "Yes", will you please state whether or not you collected an excise tax on any such seat covers so made by you?

To this last question each and every one of the

plaintiffs replied that no excise tax had been collected by them. [39]

Q. Did you charge an excise tax to the new or used car dealers for any custom made to order auto seat covers, kick pads or car rugs prior to August 15, 1952? To this question all plaintiffs answered "No."

Q. Were you at any time notified by the Bureau of Internal Revenue prior to August 15, 1952, that there was an excise tax on custom made to order seat covers or car rugs or kick pads. To this question all plaintiffs answered "No."

Q. Were you familiar with the custom of auto seat cover trade prior to August 15, 1952, with reference as to whether or not an excise tax was chargeable on custom made to order auto seat covers, car rugs or kick pads? To this question all plaintiffs answered "Yes."

Q. If your answer to the previous question is Yes, that you were so familiar, state whether or not it was the custom in the auto seat cover trade, prior to August 15, 1952, to charge an excise tax to the new or used car dealers for custom made to order auto seat covers, kick pads or car rugs? To this question all plaintiffs replied "It was not the custom."

Q. When was the first time that you learned that an excise tax was chargeable on custom made to order auto seat covers, car rugs or kick pads? To this question all plaintiffs replied "After August 1952."

Q. Would it cause financial hardship to you if

you are required to pay an excise tax for custom made to order auto seat covers, car rugs or kick pads on work performed by you for new and used car dealers prior to the 15th day of August 1952 and going back for the period that you were in business. To this question all plaintiffs answered "Yes."

Q. Do you feel that the imposition of such a tax by the Bureau of Internal Revenue for the work you performed in the manufacture of custom made to order auto seat covers, car rugs and [40] kick pads for the period prior to August 15, 1952 is a fair and just tax? To this question all plaintiffs answered "No."

Q. Do you feel that such a tax imposed upon is a denial of your constitutional rights? To this question all plaintiffs replied "Yes."

Q. In conducting your business for the period prior to August 15, 1952 did you rely upon the established usage of custom made to order auto seat cover business in failing to collect an excise tax for any auto seat covers made and installed by you on new or used cars for dealers for the period prior to August 15, 1952? To this question all plaintiffs replied "Yes."

Q. Did you know that the Excise Tax Division in the City of Los Angeles prior to August 15, 1952 had led various auto seat cover trimmers in this area to understand that there was no excise tax chargeable by them on custom made to order auto seat covers, whether made for new or used car

dealers or retail customers? To this question, all plaintiffs replied "Yes."

Q. Did you rely upon this knowledge? To this question all plaintiffs replied "Yes."

Q. Do you feel that this area should be released from the payment of any excise tax for the period prior to August 15, 1952? To this question all plaintiffs replied "Yes."

Affiant states that neither he nor any of the plaintiffs can now legally enforce payment from their customers of the excise tax now sought to be enforced against them by the defendants. Likewise such rights, if any are barred by the statute of limitations and, additionally, it would be impracticable and too costly to enforce such payment assuming that such claims were not barred. That in the case of affiant, defendants have assessed an excise tax against him in the sum of $11,973.70. That affiant has collected no part of this tax from his customers. That in [41] order for him to pay this tax he would actually be forced to mortgage his home.

That the defendants have notified other plaintiffs herein that they propose to assess excise taxes against them in amounts running into thousands of dollars. The defendants have notified Eugene L. Lessner, one of the plaintiffs, doing business as Superior Seat Cover Co. that they propose to assess a tax against him in the sum of $3685.51. That the defendants have notified Richard Lambeth and M. O. Pelter that they are to be assessed a tax in the sum of $2003.14. That other plaintiffs have received

notices from the defendants that they propose to assess excise taxes against them and that such amounts would run into large sums of money. That if Richard Lamberth and M. O. Pelter are required to pay said tax they would be forced to liquidate their business, as they do not have the money to pay this tax. That the plaintiff Gene L. Lessner is financially unable to pay this tax and it would cause him great financial hardship if he is forced to pay it.

That in equity and in good conscience the defendants should be estopped from now assessing an excise tax against any of the plaintiffs on any sales of custom made to order auto seat covers made by them prior to August 18, 1952. That the defendants have misled the plaintiffs so that plaintiffs did not prior to August 18, 1952 include in their selling price the excise tax on any sales which they made of custom made to order seat covers, whether the sales were made to retail customers or to new or used car dealers.

That on February 25, 1944 one H. G. Barnett, then the Acting Chief of the Miscellaneous Tax Division of the Department of Internal Revenue, addressed a letter to E. W. Cheadle, one of the plaintiffs herein, wherein Mr. Barnett stated that under the ruling of the Commissioner of the Department of Internal Revenue [42] all seat covers made from raw material for immediate installation were not subject to an excise tax. That similar statements were made by the predecessors of the

defendants and their agents to the plaintiffs herein. (Attached as Exhibit E.)

That neither your affiant nor any of the plaintiffs at any time knew that there was any such tax to be charged or collected by them and, in fact, all information and knowledge which plaintiffs received on this subject from the defendants or through letters or regulations made and published by the defendants or from any other source, were all consistently to the effect that there was no excise tax to be charged or collected by them for any automobile seat covers made by them if custom made to order and immediately tailored to the respective cars by them, without regard as to whether the customer was a retail customer or a new or used car dealer. The imposition and enforcement of such a tax, therefore, by the defendants against your affiant or any of the plaintiffs in this action would be an act of oppression and injustice and would cause plaintiffs great financial hardship and distress.

Wherefore, your affiant, on behalf of himself and these plaintiffs, represents as follows:

First: That the defendants and each of them are estopped from assessing an excise tax against these plaintiffs or any of them for any automobile seat covers made by them or any of them for new or used car dealers prior to August 18, 1952, if such seat covers were tailored by them to the respective automobiles and were not placed in stock for future installation.

Second: That the acts of the defendants herein

in seeking to assess or enforce an excise tax against the plaintiffs or either of them, for the period prior to August 18, 1952 for any automobile seat covers made by them for new or used car dealers [43] while at the same time exempting from the payment of such tax any sales made for auto seat cover shops for retail customers during that period of time, denies the plaintiffs and each of them the equal protection of the laws and is contrary to the Fourteenth Amendment of the Constitution of the United States.

Third: That plaintiffs herein were not at any time engaged in business as manufacturers, producers or importers of automobile seat covers, but are and were each respectively engaged in the business of operating as upholstering automobile seat cover shop and are not subject to an excise tax under the provisions of Section 3403 (c) of the Internal Revenue Code, or amendments thereto.

Fourth: That the regulations heretofore made by the defendants herein in seeking to assess or enforce an excise tax against the plaintiffs or either of them on custom made automobile seat cover sales made by them to new or used car dealers during the period prior to August 18, 1952, while at the same time exempting from the payment of such excise tax any sales of automobile glass to new or used car dealers made and installed by automobile glass shops denies the plaintiffs and each of them the equal protection of the laws and is contrary to the Fourteenth Amendment of the Constitution of the United States.

For the foregoing reasons, it is respectfully submitted that the defendants and each of them should be restrained from assessing or from enforcing payment of an excise tax against any of the plaintiffs for the period prior to August 18, 1952, on any sales of custom made to order auto seat covers made by them to new or used car dealers.

/s/ WILLIAM H. MARTIN

Subscribed and sworn to before me this 26th day of October, 1954.

[Seal] /s/ PHILLIP W. SILVER,

Notary Public in and for the County of Los Angeles, State of California. [44]

EXHIBIT "A"

W&E-1032

Modification by the Bureau of Internal Revenue of Previous Ruling Relative to Custom-Made Seat Covers, Etc., Effective Date August 18, 1952.

Section 3403(c) of the Internal Revenue Code, as amended, imposes a tax on the sale or use by the manufacturer of parts or accessories for vehicles taxable under subsections (a) and (b) of section 3403 of the Code. Seat covers, tops, door panel covers, and arm rest covers are held to be parts or accessories for automobiles within the meaning of section 3403(c) of the Code, and the manufacturer's sale of such articles is subject to tax at the rate of 8% of the selling price.

It is held that if a manufacturer furnishes the materials and makes automobile seat covers, whether according to pattern or by individually measured jobs, all sales of such covers are taxable under section 3403(c) of the Code, as amended, regardless of whether they are installed by the manufacturer or by other persons.

If, in making an automobile part, door panel, or arm rest, the fabricator simply replaces the covering on the top of the automobile, the door panel or arm rest, such operation is held to be a repair of the article and the amount charged for such repair job would not be subject to the manufacturers' excise tax imposed under section 3403(c) of the Code, as amended. However, if the fabricator makes an entirely new top, door panel, or arm rest, including the frame, from his own materials his sales of such new articles are held to be properly subject to the tax imposed under section 3403 (c) of the Code, as amended.

With respect to the basis for tax, section 3441(a) of the Internal Revenue Code provides that the tax to be paid upon sales made at wholesale shall be paid upon the wholesale (i.e., invoice) price, plus any separate charge made for containers, etc., incident to placing the articles in condition packed ready for shipment and for delivery of the shipments. From such adjusted price is to be excluded any expenses actually incurred by the manufacturer (1) in effecting delivery of the articles to the purchasers, (2) for installation of the articles and (3) for insuring the shipments to customers. [45]

EXHIBIT "B"

Treasury Department Internal Revenue Service
Los Angeles 12, Calif.

Office of the Collector — October 14, 1947
Sixth District of California
In reply refer to MT:M

Blackwood's Auto Seat Covers
1565 India Street
San Diego, California

Attention: E. A. Blackwood

Dear Mr. Blackwood:

Reference is made to your letter of October 10, 1947, relative to automobile seat covers.

As the manufacturer of seat covers you are required to keep adequate records on your sales. The manufacturers' tax of 5 percent on your net selling price applies under Section 3403(c) to sales of seat covers from your shelves, made up by you as stock.

If, as it appears, you have car owners bringing in cars requesting you to make to order seat covers from materials you stock, which you install in their cars, no tax applies.

Very truly yours,

Harry C. Westover, Collector
/s/ By Leo L. Reusche
Leo L. Reusche,
Assistance Chief Miscellaneous
Tax Division [46]

"EXHIBIT C"

State of California,
County of Los Angeles—ss.

Rubie Gilbert, being first duly sworn, deposes and says: That he is a Public Accountant licensed to practice in the State of California.

That in April of 1948 he was employed at Mono Auto Seat Cover Company to audit their books. That at that time Mono Auto Seat Cover Company was engaged in the business of manufacturing automobile seat covers for both wholesale and retail and for both new and used cars to the general public as well as the dealers. That when your affiant audited the books of Mono Auto Seat Cover Company he discovered that Mono Auto Seat Cover Company had been paying an excise tax on the full amount of the sale of all the seat covers made by them for both wholesale and retail and, whether to the general public or for a dealer. That affiant, thereupon, telephoned the Internal Revenue Bureau, Excise Tax Division, asked for the person in charge of the office and after being connected, informed this person that he was an accountant; that he was employed by a seat cover firm to audit their books and that he was endeavoring to compute the amount of the excise tax correctly due on seat-cover sales and wanted to obtain information from the Internal Revenue Bureau as to the taxability on various types of seat covers. That your affiant thereupon informed this person and the Internal Revenue Bureau that his client, Mono Auto

Seat Cover Company had been paying a tax on all seat covers made by them whether for retail customers or wholesale customers and whether manufactured, custom-made or ready made, and wanted to know if such tax was properly chargeable on all of these various types of seat covers. That your affiant was informed that there would be no excise tax collectible on any custom made to order seat covers whether made for retail customers or wholesale customers, but that the only tax collectible [47] would be on stock seat covers manufactured and sold, whether wholesale or retail, nor would there be any tax on that portion of the sale which includes installation charge, provided that the installation charge is separately stated; nor would there be any tax on delivery, express or other shipping charges provided such charges were separately stated; also that trade discounts could be deducted from gross sales in computing taxable sales, likewise for cash discounts. That there was specifically no tax on the sale of seat covers which had been purchased ready made from another manufacturer.

/s/ RUBIE GILBERT

Sworn and subscribed to before me this 3rd day of August, 1954.

[Seal] /s/ PHILLIP W. SILVER,
Notary Public in and for the County of Los Angeles, State of California. [48]

EXHIBIT "D"

State of California,
County of Los Angeles—ss.

Louis Lampert, being first duly sworn, deposes and says: That he is a certified public accountant duly licensed by the State of California; that he makes this affidavit at the request of Phillip W. Silver.

Your affiant states that in February of 1950 he was employed by Mr. Phillip W. Silver to audit the books of a business then operated by Mr. Silver under the name of Mono Auto Fabrics. That in the process of auditing these books, your affiant observed that no excise tax was being collected by Mr. Silver or his employees in the manufacture by Mr. Silver of auto seat covers made by him at his factory on custom made to order work and that the only tax then being paid by Mr. Silver was a tax on auto seat covers manufactured by him and shipped to the various customers in a package. Your affiant thereupon discussed this matter with Mr. Silver and asked Mr. Silver if he was relying upon any opinion or rule or bulletin issued by the Internal Revenue Bureau in failing to collect a tax on the custom work being done by him. That Mr. Silver informed your affiant that the previous accountant in your affiant's employ had called the Internal Revenue Bureau at his suggestion to obtain an opinion from the Excise Tax Division of the Los Angeles Internal Revenue Bureau as to whether a tax was collectible or payable on custom

made to order auto seat covers and that this previous accountant, a man named Rubie Gilbert had been informed by the Los Angeles Excise Tax Division of the Internal Revenue Bureau that an excise tax was not collectible on custom made to order auto seat covers, whether made for dealers or the general public, and that it was on the basis of this opinion, that Mr. Silver was not collecting an excise tax on custom made to order auto seat covers. That Mr. Silver suggested to your affiant that he call the Internal Revenue [49] Bureau to verify the previous opinion that his former accountant had received. That thereupon Mr. Silver did call the Excise Tax Division of the Los Angeles Internal Revenue Bureau in the presence and hearing of your affiant and that he asked to be connected with the head of the Excise Tax Office. That after Mr. Silver spoke to the person who responded to the telephone call, your affiant took over the phone and thereupon engaged in the following conversation.

Your affiant introduced himself by stating his name, his occupation and that he was a certified public accountant and that he was auditing the books of Mono Auto Fabrics and that he was interested in learning whether an excise tax was chargeable and payable on custom made to order auto seat covers. That the person who spoke to your affiant stated that they had received word from Washington that there was no tax to be collected on custom made to order seat covers, but that the only excise tax to be collected was on the whole-

sale manufacture of auto seat covers in the package, that is to say, box covers or covers that were shipped out for installation by the customers themselves, such as seat covers being shipped to a car dealer where the car dealer maintains his own installation facilities, but that any auto seat covers manufactured and installed on the premises and on the car whether the customer be a new or used car dealer or a retail customer, that there would be no excise tax chargeable and payable. Your affiant thereupon asked the person to whom he was speaking if the local department had an official bulletin which could be made available to him; that the person replied they did have a bulletin from Washington to cover their instructions on this matter, but that such a bulletin was not available for distribution. Your affiant thereupon asked the party to whom he was speaking what her capacity was with the Internal Revenue Bureau, Excise Tax Division, and the person replied that she was in charge of the Excise Tax Division of the Los Angeles office. Your affiant thereupon stated that he would advise his [50] client there was no tax due from him on custom made auto seat covers and that he would make his return accordingly.

That your affiant continued in the employ of the Mono Auto Fabrics until he discontinued business operations in September of 1953. That the first time your affiant learned that there was a tax collectible on custom made to order auto seat covers was some time in the latter part of August 1952 or the early part of September of that year, at which time Mr.

Silver showed him a letter which had been received by him on or about that date, in which a new interpretation was made by the Internal Revenue Bureau of the Los Angeles office to the effect that an excise tax would thereafter be due and collectible on custom made to order seat covers. That upon receipt of this letter your affiant told Mr. Silver that henceforth he should commence collecting excise tax on any custom auto seat covers inasmuch as he would be required to remit such excise taxes to the Internal Revenue Bureau.

/s/ LOUIS LAMPERT

Subscribed and sworn to this 12th day of August, 1954.

[Seal] /s/ PHILLIP W. SILVER,
Notary Public in and for the County of Los Angeles, State of California. [51]

EXHIBIT "E"

Treasury Department, Internal Revenue Service
Los Angeles, Calif. 12

Office of the Collector February 25, 1944
Sixth District of California
In Replying Refer to MT:M

Mr. George L. Chradle,
1189 East Anaheim,
Long Beach, California

Dear Mr. Chradle:

Reference is made to your letter of February 11,

1944, requesting to be advised concerning your liability to the manufacturer's excise tax on auto parts. You state that you manufacture seat covers and are paying tax on the full amount for making and installing same.

The Commissioner of Internal Revenue has held that repair shops which made up top covers, side curtains, etc. from raw material for immediate installation are not liable for tax on such jobs, but where the articles are made up and placed in stock, tax attaches to the sale thereof.

If you manufacture seat covers and keep them in stock, tax will attach to your sale thereof based upon your established wholesale selling price, that is, if you sell at retail, the tax will be based upon the wholesale selling price of similar seat covers.

The charge for installation, if billed separately, may be excluded in computing the tax.

Very truly yours,

Harry C. Westover, Collector
By H. G. Barnett,
Chief Miscellaneous Division [52]

[Endorsed]: Filed Oct. 29, 1954.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Upon reading the verified complaint of the plaintiffs in this action and the affidavit of the plaintiff, and good cause appearing therefor,

It is hereby ordered that the defendant, Robert A. Riddell, District Director of the Collector of Internal Revenue for the Los Angeles District, appear before this Court in the Courtroom of Department 1 on the 15th day of November, 1954, at the hour of 10 a.m., then and there to show cause, if any he have, why he, his agents, servants, employees and attorneys should not be enjoined and restrained during the pendency of this action from [53] assessing or proceeding with the assessment or enforcement of any taxes assessed against the plaintiffs or either of them, for the period prior to August 18, 1952 under Section 3403 of the Internal Revenue Code of the United States and any amendments thereto.

Dated this 3rd day of November, 1954.

/s/ BEN HARRISON,
Presiding Judge of the United States District Court [54]

[Endorsed]: Filed Nov. 3, 1954.

[Title of District Court and Cause.]

NOTICE OF MOTION

To the defendants above named and to the United States Attorney:

Please take notice that the plaintiffs will on the 15th day of November, 1954, at the hour of 10 a.m. before the Honorable Peirson Hall move the Court

for a preliminary injunction in the above entitled cause, enjoining the defendants, their agents, servants, employees and attorneys from assessing or proceeding with the assessment, or from seizing, taking by distraint and selling any of the goods, chattels, effects, including stocks, securities, bank accounts, evidences of debt or other personalty and real property of the above named plaintiffs. Said [55] motion will be made and based upon the complaint of the plaintiffs, the affidavit of William H. Martin, Points and Authorities and this Notice of Motion.

/s/ PHILL SILVER,
Attorney for Plaintiffs [56]

[Endorsed]: Filed Nov. 3, 1954.

[Title of District Court and Cause.]

MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Statement of the Issues Involved

Whether plaintiff can maintain an action to enjoin a proposed assessment of Federal excise taxes in the face of the express provisions of Section 3653 of the Internal Revenue Code (1939) and Section 2201 of Title 28, U.S.C.A.

* * * * * [57]

LAUGHLIN E. WATERS,
United States Attorney
EDWARD R. McHALE,
Assistant U.S. Attorney
Chief, Tax Division
EUGENE HARPOLE,
Special Attorney, Internal
Revenue Service

/s/ By EDWARD R. McHALE,
Attorneys for Defendants [71]

EXHIBIT "A"

Revenue Agent's Proposed Adjustments Affecting Tax Liability

Name of taxpayer: Martin's Auto Trimming, Inc.

Address of taxpayer: 1243 So. Alvarado, Los Angeles, California.

Kind of tax: Mfgr's Excise; period 8-1-50 to 8-31-52.

At the time the proposed adjustments affecting your tax liability were discussed, you did not agree to the items marked (*) listed below:

*Additional manufacturers excise tax in the amount of $11,917.73 unreported on the manufacture and sale of custom made seat covers.

You are advised that you may present your objections to the proposed changes at an informal conference which may be requested within the next 10 days by telephoning or writing to the following address:

Group Supervisor: A. A. Underhill; Telephone No.: MI 8111, Ext. 700.

Address: 1721 Federal Building.

If you decide to accept the findings as set out above, please advise. If no informal conference is requested, an examination report will be mailed to you by the District Director of Internal Revenue.

Aug. 18, 1954.

C. C. Freed,
Internal Revenue Agent

Received copy: Wm. H. Martin (signed). [72]

EXHIBIT "B"

[Title of District Court and Cause.]

AFFIDAVIT IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

State of California,
County of Los Angeles—ss.

Alvin A. Underhill, being first duly sworn, deposes and says:

I am Group Supervisor of the Excise Tax Group of the Audit Division of the District Director's Office of the Internal Revenue Service for the Southern District of California, with my post of duty at the City of Los Angeles, State of California. In the course of my duties as Group Supervisor, I assign all excise tax independent audits to Internal Revenue agents making such audits who work under my supervision. All reports pursuant

to audits assigned to these agents are forwarded to me for approval.

In the course of my duties as Group Supervisor of the Excise Tax [73] Group, I have recourse to the records pertaining to excise tax audits assigned by me. After examining such records I can assert that there are only twelve cases where excise tax audits have been made to determine whether the taxpayer is liable for additional excise taxes imposed by the provisions of Section 3403(c) of the Internal Revenue Code (1939). Such audits have resulted in the issuance of a revenue agent's proposed adjustments affecting tax liabilities, also called notices of proposed assessments, but in not any of these twelve cases has an actual assessment been made. In at least seven of these twelve cases the amounts proposed to be assessed are less than $2,000.00. In approximately six other cases, excise tax assessments have been made, but only after an agreement was reached between the agent and the taxpayer as to the correct excise tax liability.

The plaintiff seeking the preliminary injunction in this case is one of the twelve taxpayers referred to above and in the same position as the other eleven taxpayers. All of these taxpayers are afforded the right to present their objections to the proposed assessments at an informal conference which may be requested within ten days following the receipt of the notice of proposed assessment. By letter to the Director of Internal Revenue, dated August 20, 1954, plaintiff requested that its right to a conference be extended for a period of thirty

(30) days, which request was granted. On September 14, 1954, plaintiff again requested, and was granted, a thirty-day extension for such conference. On October 22, 1954, plaintiff again postponed the conference to October 29, 1954. On October 29, 1954, plaintiff again requested and was granted a postponement of the conference to November 4, 1954. On November 4, 1954, I was advised that the instant court action had been instituted and no further attempts were made to confer with plaintiff.

/s/ ALVIN A. UNDERHILL,
Affiant

Subscribed and sworn to before me this 1st day of December, 1954.

[Seal] /s/ CHARLES E. JONES,
Deputy Clerk [74]

Affidavit of Service by Mail attached. [75]

[Endorsed]: Filed Dec. 1, 1954.

[Title of District Court and Cause.]

AFFIDAVIT OF WILLIAM H. MARTIN IN REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

State of California,
County of Los Angeles—ss.

William H. Martin, being first duly sworn, deposes and says: That he makes and files this af-

fidavit in reply to a memorandum filed by the defendants herein in opposition to plaintiffs' motion for preliminary injunction.

In defendants' memorandum the statement appears, "It had been the consistent position of the Internal Revenue Service, however, that the sale of seat covers similarly produced to a dealer in new or used automobiles is not a sale for consumption but one for resale and that the tax attaches to the manufacturer's sale thereof". This statement is not supported by any facts in defendants' memorandum and is contrary to the facts as they exist. [76]

For 20 years it was the position of the Internal Revenue Department in the City of Los Angeles as well as throughout the United States that there was no excise tax applicable to any automobile seat covers custom made to order, regardless as to whether they were made for retail customers directly or for used or new car dealers. Actually, it would make no difference whether the seat covers were made for a retail customer directly or for a new or used car dealer. The tax in question is an alleged manufacturers tax. When an automobile upholstery seat cover shop makes a custom set of seat covers for a dealer that fact does not change him into a manufacturer, if he were not a manufacturer to begin with.

The true facts are that it was not until August, 1952, that the Internal Revenue Service, for the first time indicated that they regarded the excise tax applicable to sales made to new and used car

dealers and that the tax would be enforced retroactive to any sales made by upholstery shops to new and used car dealers, but the Internal Revenue Department stated in their bulletin issued August 19, 1952, S.T. 944, that this new interpretation, which they called a ruling, would not be applied retroactively with respect to sales of seat covers produced for the consumer, but would apply it retroactively to sales made to dealers in new and used cars, and although in S.T. 944 the collector does say that the sales by a manufacturer of seat covers produced according to individual design and measurement to a dealer in new and used cars was held to be not effected by the ruling of August 18, 1952, as such sales were deemed taxable prior to the ruling and the tax was considered to continue to attach as in the past to such sales this is a self-serving declaration unsupported by any evidence either as presented in defendants' memorandum or otherwise, and directly contrary to the evidence presented in the plaintiffs' affidavits.

In plaintiffs' affidavit your affiant has set forth reports made to him by Mr. Herbert G. Barnett and it is to be noted [77] in the letter issued and signed by Mr. H. G. Barnett, under the title of Harry C. Westover, Collector, that Mr. Barnett specifically made no distinction as to sales made to individuals and sales made to dealers, and stated that seat covers made from raw materials for immediate installation are not liable for tax on such jobs. This letter, verbatim, reads as follows:

"Treasury Department, Internal Revenue Service,

Los Angeles, Calif. 12

Mr. George L. Chradle, Feb. 25, 1944
1189 East Anaheim, Long Beach, California

Dear Mr. Chradle:

Reference is made to your letter of February 11, 1944, requesting to be advised concerning your liability to the manufacturer's excise tax on auto parts. You state that you manufacture seat covers and are paying tax on the full amount for making and installing same.

The Commissioner of Internal Revenue has held that repair shops which make up top covers, side curtains, etc., from raw materials for immediate installation are not liable for tax on such jobs, but where the articles are made up and placed in stock, tax attaches to the sale thereof.

If you manufacture seat covers and keep them in stock, tax will attach to your sale thereof based upon your established wholesale selling price, that is, if you sell at retail, the tax will be based upon the wholesale selling price of similar seat covers.

The charge for installation, if billed separately, may be excluded in computing the tax.

Very truly yours,

Harry C. Westover, Collector
/s/ By H. G. Barnett,
Chief Miscellaneous Division"

In affiant's original affidavit, a conversation he

held with Mr. Barnett is set forth and in that conversation affiant has alleged that Mr. Barnett informed him there was no excise tax on custom made to order seat covers. In this conversation affiant had explained to [78] Mr. Barnett that he was engaged in the automobile upholstery business; that the major part of his business was for new and used car dealers. That the local office of the Collector of Internal Revenue made no distinction between sales made to new or used car dealers or to retail customers is further corroborated by the affidavit of Rubie Gilbert, an accountant, whose affidavit marked Exhibit "C" is attached to affiant's original affidavit on file, and in that affidavit Rubie Gilbert stated that he was informed by the Los Angeles Internal Revenue Bureau that there was no excise tax collectible on any custom made to order seat covers, whether made for retail customers or wholesale customers, and that the only tax collectible would be on seat covers manufactured and placed in stock. Affiant was further corroborated by Louis Lampert, a certified public accountant, whose affidavit is on file in this case and is attached to your affiants original affidavit and made a part thereof and in that affidavit made by Louis Lampert, Louis Lampert states that he was informed by the head of the excise tax office in the Los Angeles Internal Revenue Bureau that they had received word fromWashington that there was no tax to be collected on custom made to order seat covers and that the only excise tax to be collected was on the wholesale manufacturer of auto seat covers in the package and that

any auto seat cover manufactured and installed on the premises, whether the customer be a new or used car dealer, would not be subject to excise tax.

Affiant is further corroborated by a letter dated October 14, 1947, sent under the title of Harold C. Westover, Collector, signed by Leo L. Reusche, identified as Assistant Chief Miscellaneous Tax Division, in which Mr. Reusche specifically stated that if car owners bringing in cars request him to make to order seat covers from materials which he stocks, and which he installs in their cars, no tax applies. This letter is attached to affiant's original affidavit, marked Exhibit "B", and it is to be noted that no [79] distinction is made by Mr. Reusche as to sales made to car owners who may be individuals or car owners who may be dealers.

As a matter of fact, since this action was filed, a letter was issued by R. J. Bopp, Chief, Excise Tax Branch in Washington, sent to National Association of Auto Trim Shops, in which Mr. Bopp specifically says that he agrees with a decision made by the United States District Court for the Southern District of Florida, that the distinction sought to be invoked by the Collector of Internal Revenue against the trim shops in the Southern District of Florida on sales made by them to dealers was an unwarranted distinction. An exact copy of this letter is attached hereto and made a part of this affidavit. That in the case referred to by Mr. Bopp in his letter, the District Court for the Southern District of Florida rendered a judgment that an excise tax assessed by the Collector of Internal Revenue

against an auto upholstery shop for sales made to dealers as distinguished from sales made to consumers was improperly assessed and that no distinction between general customers and dealers should be drawn. That a copy of the Findings of Fact and Conclusions of Law in that action are attached hereto and made a part of this affidavit.

If there was any ruling or bulletin in existence prior to August 18, 1952, declaring that sales made to dealers were subject to excise tax prior to August 18, 1952, this ruling was unknown to any official in the Los Angeles office of the Collector of Internal Revenue and the fact remains that for 20 years prior to August 18, 1952, no effort was made by the Collector of Internal Revenue in Los Angeles to collect a tax for any sales made by the upholstery shops to dealers. Actually, on sales made by the upholstery shops to the dealers, in many instances, especially to the used car dealers, the dealers themselves were the owners of the cars. With respect to the new cars, the dealers in many instances only act as intermediaries, but regardless of the mechanics of the sale the sewing of a [80] set of seat covers by the upholstery shop for a dealer could no more convert the upholstery shop into the status of a manufacturer than could the sewing of a suit of clothes by a tailor for a store, whether as a practice or an accommodation or otherwise, convert the tailor into the category of a manufacturer.

The letters attached to affiant's affidavits clearly indicate that the only distinction the Collector of Internal Revenue was concerned with was whether

the seat covers were made up for stock, placed on shelves and boxed, which they concluded placed the seat covers in the category of manufactured seat covers for resale and conversely it appears from these letters and the statement shown that the Treasury Department regarded custom made to order seat covers as constituting a sale of labor and exempt from the excise tax.

It is to be noted that the defendants herein have completely failed to dispute affiant's contention that this tax is a manufacturers tax and was never intended to be applicable to persons other than manufacturers. As pointed out in the original affidavit, Section 3403(c) of the Internal Revenue Code, speaks of a tax on sales made by the manufacturer. In all the bulletins issued by the defendants they speak of transactions involving a manufacturer. In the letters issued by the various heads of the Excise Tax Division, they speak of manufacturers. Your affiant asks the court to take cognizance of the fact that manufacturers operate on a mass production scale. They produce seat covers in volume. They manufacture the seat covers according to patterns, wrap them and box them and ship them out to other stores or distributors. Transactions engaged in by affiant and by the various plaintiffs in this case, in each and every instance involved a single individual transaction in which the cushions and the back rests of the automobile would be removed from the car; the seat cover material would be laid on the cushions and on the back rests and the material cut to the contours [81] of the upholstery, then sewn

with appropriate facing material, and immediately installed on to the car. There is thus a clear distinction between a seat cover made in this manner, which certainly cannot be considered manufactured by a manufacturer, and seat covers made in mass production, through patterns with multiple cutting and mass production sewing techniques, boxed and made into the category of a ready made seat cover.

It is respectfully submitted by your affiant that no valid basis exists to place these plaintiffs into the category of manufacturers and subject them to a manufacturers excise tax.

Affiant states that defendants are seeking to collect a tax from plaintiffs on non-taxable sales. That Martin's Auto Trimming, Inc., does not have any excess funds on hand to pay this tax; that the corporation has actually operated at a loss during the current year; that it does not have any borrowing capacity; that if the defendants insist upon payment in full, the corporation does not have the funds to pay such a tax, nor does it have the financial ability to raise this money. That the imposition and enforcement of this tax would destroy plaintiff's business and inflict loss upon the corporation for which it would have no adequate remedy at law.

[Seal] MARTIN'S AUTO TRIMMING, INC.
/s/ By WILLIAM H. MARTIN,
President

State of California,
County of Los Angeles—ss.

On this 30 day of December, 1953, before me, a

Notary Public, personally appeared William H. Martin, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same on behalf of the corporation, and acknowledged to me that such corporation executed the same, and that he is the President of the corporation.

In Witness Whereof I have hereto set my hand and affixed my seal the day and year first above written.

[Seal] /s/ PHILL SILVER [82]

Copy of letter from R. J. Bopp, Chief, Excise Tax Branch

National Association of Auto Trim Shops
865 Broadway, New York 3, New York

Attention: Mr. William J. Allen

Gentlemen:

This is in reply to your letter of August 25, 1954, addressed to the Commissioner of Internal Revenue, and to your letters, each dated August 27, 1954, addressed to the Secretary of the Treasury, and to the General Counsel of the Treasury, which have been referred to this Service for reply. A copy of the "Findings of fact and conclusions of law" by the District Court of the United States for the Southern District of Florida, Miami Division, in the case of Johnnie & Mack, Inc., vs. The United States of America, and John S. Feller t/a Johnnie

& Mack Body Shop vs. United States, was enclosed with your letter.

You state that at the present time there exists much confusion and misunderstanding as to the effect of the foregoing decision on the auto trim shops throughout the United States, and request that clarification of the decision be made.

In the above case the taxpayers were in the business of making automobile seat covers to order and they sold a small fraction of their product to car dealers. Excise tax was assessed against them on the seat covers sold to dealers. The District Court held that as the taxpayers sold each seat cover to an individual order, no distinction between general customers and dealers should be drawn. The court held, therefore, that the tax was improperly assessed. The periods covered in this suit were January 1947 to February 1949 and March 1949 to October 1950.

Section 3403(c) of the Internal Revenue Code of 1939 imposes a tax on the sale or use by the manufacturer of parts or accessories for the articles named under subsections (a) and (b) of section 3403 of the Code. Seat covers for automobiles are held to be parts or accessories for automobiles within the meaning of section 3403 (c) of the Code, and the manufacturer's sale of seat covers is subject to the tax imposed under the section of the law.

On August 18, 1952, S.T. 944 modifying previous rulings with respect to the taxability of automobile seat covers was published in the Internal Revenue Bulletin. It was held that where a manufacturer

furnishes the material and produces automobile seat covers for the consumer thereof, according to individual design and measurement, the sale by the manufacturer of such seat covers is taxable under section 3403 (c) of the Code, regardless of whether they are installed by the manufacturer or by other persons. The effective date of S.T. 944 is August 18, 1952, the date of its publication.

The taxability of custom-made seat covers upon order of car dealers was not established for the first time by S.T. 944. To the contrary, in a series of rulings issued in the past several years, [83] we have uniformly ruled that seat covers so made are taxable. Our position on the matter is clearly indicated in the second paragraph of S.T. 944, which reads as follows:

"The Bureau has issued rulings heretofore that the only circumstances under which the tax does not apply to sales of seat covers by a manufacturer, is where the seat covers are individually designed, cut, tailored, and fitted by the manufacturer to the automobile belonging to the person who contracts for the performance of such operation, and such person is the consumer of the seat covers. Such rulings provided, however, that the sale of seat covers, similarly produced, to a dealer in new or used automobiles is not a sale for consumption but one for resale, and that the tax attaches to the manufacturer's sale thereof."

In fact, S.T. 944 was issued to announce the rule that the tax applies to all custom-made seat covers, regardless of the class of customer for whom made.

However, since seat covers made for consumers (as distinguished from car dealers) had not theretofore been held taxable, the ruling was made nonretroactive in its application to such seat covers. But such limitation upon the retroactive application of the ruling was not intended to affect the taxability of seat covers for car dealers, in respect of which our position was not changed by the ruling.

We agree with the court's conclusion of law that the distinction drawn between sales of seat covers made to order of individual automobile owners and new or used car dealers is an unwarranted distinction. It is on this basis that our published ruling S.T. 944 is predicated. However, we cannot agree with the district court's view that sales of seat covers are sales of labor and material for this view would eliminate completely the tax that we believe the law intended to impose. Nor can we acquiesce in the court's conclusion of law that because a distinction was made in the particular case between sales of seat covers to automobile dealers and sales to consumers, no tax was due on sales to dealers. In view of the importance of the matter and the reasons cited, it should be apparent why we feel compelled to adhere to our position until the matter has been tested by litigation in other cases.

Very truly yours,

R. J. Bopp,
Chief, Excise Tax Branch [84]

Copy

Johnnie & Mack, Inc., a Florida corporation, Plaintiff vs. The United States of America, Defendant, John S. Feller, an individual t/a Johnnie & Mack Body Shop, Plaintiff vs. The United States of America, Defendant.

In the District Court of the United States for the Southern District of Florida, Miami Division. Nos. 5024-M Civil, 5023-M Civil. June 16, 1954.

Manufacturers' excise taxes. Automobile parts and accessories.—Taxpayers were in the business of making automobile seat covers to order, and sold a small fraction of their product to car dealers. The Commissioner assessed an excise tax for the seat covers sold to dealers. The District Court held that as taxpayers sold each seat cover to an individual order, no distinction between general customers and dealers should be drawn. Therefore the Court held that the tax was improperly assessed.

Findings of Fact and Conclusions of Law

Findings of Fact

Holland, District Judge:

1. The Court has jurisdiction of the parties and the subject matter.

2. The plaintiffs are John S. Feller, an Individual T/A Johnnie & Mack Body Shop in No. 5023-M-Civil, and Johnnie & Mack, Inc., a Florida corporation, in 5024-M-Civil.

3. The plaintiff Johnnie & Mack, Inc., and its

predecessor John S. Feller operated and operates, among others, a seat cover business in Miami, Florida.

4. Seat covers are made to individual order after selection of fabrics by the purchaser, regardless of whether the purchaser is an individual automobile owner or is a new or used automobile dealer.

5. The automobile dealers are to be regarded under the applicable tax law as consumers of the product sold.

6. The sales of seat covers are sales of labor and materials and are not sales of seat covers as accessories.

7. The respective plaintiffs have paid a deficiency manufacturer's excise tax on seat covers in the following amounts: John S. Feller, in 5023-M-Civil, $392.28, Johnnie & Mack, Inc., in 5024-M-Civil, $477.03, calculated on the basis of one and one-half per cent of the gross sales as being sales to dealers.

8. The taxes assessed and collected by the defendant, United States, were improperly assessed and collected.

Conclusions of Law

1. The alleged taxable sales here involved, being one and one-half per cent of the total gross sales indicates that the defendant regarded the sales to individuals as being sales of seat covers not manufactured in such a manner as to be taxable under 26 U.S.C.A., Section 3403 (c) as amended and applicable to this case, and the Court concludes as a

matter of law that the distinction drawn by the defendant regarding the one and one-half per cent of the total gross sales, which represented sales to dealers of used and new automobiles, was an unwarranted distinction.

2. The Court concludes that the respective plaintiffs should have and recover the amounts as agreed in the stipulation between the parties.

3. Costs of this action should be taxed by the Clerk against the defendant.

4. A judgment should be drawn conforming to these findings and submitted to the Court for signature. [85]

Acknowledgment of Service attached. [86]

[Endorsed]: Filed December 31, 1954.

[Title of District Court and Cause.]

AFFIDAVIT OF EUGENE L. LESSNER

State of California,
County of Los Angeles—ss.

Eugene L. Lessner, being first duly sworn, deposes and says:

That he is one of the plaintiffs in the above entitled case. That there has been served upon him a notice of a proposed assessment for excise taxes for custom made to order seat covers made by him for new and used car dealers prior to August 18, 1952, in the sum of $3,685.51.

Your affiant states that he did not collect any portion of the excise tax in question; that he does not have the funds to pay these excise taxes. That he had been led to believe that there was no excise tax chargeable on custom made to order seat covers, [87] whether made for dealers or for retail customers. That your affiant is not a manufacturer, but that all seat covers made by him were individually made on a custom made to order basis and installed on the respective cars for which the seat covers were made.

That if the defendants would enforce payment of this tax against affiant, such enforcement would destroy his business and inflict loss upon him, for which he would have no adequate remedy at law.

/s/ EUGENE L. LESSNER

Subscribed and sworn to before me this 29th day of December, 1954.

[Seal] /s/ PHILL SILVER,
Notary Public in and for said
County and State [88]

Acknowledgment of Service attached. [89]

[Endorsed]: Filed December 31, 1954.

[Title of District Court and Cause.]

AFFIDAVIT OF KENNETH SORENSEN

State of California,
County of Los Angeles—ss.

Kenneth Sorensen, being first duly sworn, deposes and says:

That he is one of the plaintiffs in the above entitled case. That there has been served upon him a notice of a proposed assessment for excise taxes for custom made to order seat covers made by him for new and used car dealers prior to August 18, 1952, in the sum of $1,789.51.

Your affiant states that he did not collect any portion of the excise tax in question; that he does not have the funds to pay these excise taxes. That he had been led to believe that there was no excise tax chargeable on custom made to order seat covers, [90] whether made for dealers or for retail customers. That your affiant is not a manufacturer, but that all seat covers made by him were individually made on a custom made to order basis and installed on the respective cars for which the seat covers were made.

That if the defendants would enforce payment of this tax against affiant, such enforcement would destroy his business and inflict loss upon him, unless affiant was successful in borrowing money to pay this tax.

/s/ KENNETH SORENSEN [91]

Acknowledgment of Service attached. [92]

[Endorsed]: Filed December 31, 1954.

[Title of District Court and Cause.]

AFFIDAVIT OF PHILL SILVER IN REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

State of California,
County of Los Angeles—ss.

Phill Silver, being first duly sworn, deposes and says:

That he makes and files this affidavit in reply to a memorandum filed by the defendants herein in opposition to plaintiffs' motion for preliminary injunction. Affiant states that he is the attorney of record for the plaintiffs.

That defendants have raised the issue that plaintiffs have not exhausted their administrative remedies and therefore should be denied the injunctive relief prayed for. Defendants affidavit of Alvin A. Underhill alleges that there are only 12 cases where excise tax audits have been made.

Affiant states that prior to the commencement of this action [122] he had a telephone conversation with the above mentioned Alvin Underhill. That your affiant informed Mr. Underhill that he represented the California Auto Trimmers Association. That the association was composed of practically all the trim shops in the State of California and that your affiant had been employed to represent

all trim shops in any excise tax assessment. Affiant stated that many of the trim shops were being audited and handed proposed assessments; that they were being greatly inconvenienced and frightened by the prospect of being called upon to pay a tax which they had not collected and which they had been led to believe was not chargeable. Affiant asked Mr. Underhill if one case could be followed through before him, as a test case; that that case would be followed through all of the channels provided for tax appeal in the event he overruled the objections thereto. That Mr. Underhill stated to him that he had no authority to enter into such an agreement; that he would have to proceed against each trim shop individually with audits and assessments and that each assessment would be handled separately.

Your affiant informed Mr. Underhill that letters had been sent by the Office of the Collector to several of the trim shops advising them that there was no excise tax on custom made seat covers; also that affiant had obtained affidavits from several accountants reciting that they had been informed by the Collector's Office that there was no excise tax on custom made seat covers, whether made for retail customers or dealers.

Affiant further stated to Mr. Underhill that at no time prior to August, 1952, were any of the trim shops in California ever informed that there was an excise tax payable from them on custom made seat covers; that none of them had ever collected any such tax, and that a tax imposed now would drive

many of them out of business. That Mr. Underhill stated that he had received instructions from Washington to undertake an audit on all trim shops in this area, to determine what sales had been made to dealers and to make assessments [123] against all such trim shops and that he would have to proceed with these audits.

Affiant states that the California Auto Trim Association is composed of 185 members; that this action is brought on behalf of all of said members. Affiant has in his possession letters signed by 81 members authorizing affiant to prosecute this suit on their behalf; that the remaining members have authorized this action through motions of their board of directors. That with but one or two exceptions, all of the trim shops in question have made seat covers for dealers, prior to August, 1952, and would be subject to audit if carried on by the defendants. That this procedure, if followed through by the defendants, would require each trim shop to make and file objections, pleading abatement, or pay the tax and file claim for refunds. That if this procedure is followed there will be a multiplicity of claims, hearings and proceedings, with a tremendous amount of time consumed not only of the employees of the defendants but also as to each and every trim shop. That if the administrative officers overrule the objections of the individual trim shop owners, eventually it would lead to a multiplicity of suits in the Federal Court, wherein each shop owner would be seeking legal action either by restraint or refund. That hundreds of hours will be consumed in going

over and over the identical legal questions and objections in each case.

That Mr. Underhill informed your affiant that "his hands were tied"; that actually, he personally had no authority to overrule Washington or the matter of assessing the tax; that such a decision would actually have to come from some one "higher in authority than he".

Your affiant states that this action for injunctive relief was commenced by him after he was informed by Mr. Underhill that he had no authority to sustain the objections, if any, made to the tax, and that he intended to make an assessment regardless of the legal [124] objections which affiant had disclosed to him. That it would be a useless formality to require affiant to appear before Mr. Underhill and present the proposed objections.

That there are a number of Constitutional questions as well as questions of legal interpretation requiring the opinion of the courts. That the amount involved runs into many thousands of dollars, affecting not only the 185 members of the California Auto Trim Shops, but other non-member trim shops, of which there are at least 1500.

Mr. Underhill states that in seven of the audits already made the tax assessments are less than $2,000.00, which assumes that five are over $2,000.00. Affiant states that many of the trim shops in question are small shops operated by the owners themselves, and in some instances with a helper. That many of these small shop owners are actually operating with a small working capital and do not have

the funds to employ counsel and pursue separately an action through the courts to obtain a decision on the merits of their tax liability. That many of these shop owners do not have the money to pay the tax even if the amount is less than $2,000.00, and that if they are forced to pay the tax, would be required to exhaust all or the greater part of their capital. That many of them, if faced with a tax of sizeable amounts, would actually close their business, as they would have no money to continue to operate. That if tax liens are filed against them, those that are unable to pay the tax would be immediately denied any further credit by the wholesalers and could not continue to operate without such credit.

That great confusion, loss of time, loss of money and even complete loss of businesses would result to many of them if the defendants proceed with tax assessments and enforcement. That plaintiffs have brought this class action on behalf of all the trim shops and thus, in one action a speedy determination of the rights of all the parties hereto will be had. That it would be in the interest and furtherance of justice to permit this class action to proceed. [125]

Section 3448 of the Internal Revenue Code provides for penalties of 6% per annum from the time when the tax became due until paid. Section 3612 provides for a penalty of 25% of the amount of the tax in case of any failure to make and file a return within the time prescribed by law, or in lieu thereof, additional penalties of 5% for each additional 30 days, or fraction thereof, not to exceed

25%. Section 2707 provides that any person who fails to pay, collect, and pay over the tax shall, in addition to other penalties provided by law, be liable to a penalty of the amount of the tax not paid. Section 316.95 provides that any person who wilfully fails to pay any tax due, file or return is subject to a fine of $10,000.00, or imprisonment, or both.

That attached hereto, marked Exhibit "A", is a list of the members of the California Auto Trim Shops who have individually, in writing, authorized this suit to be prosecuted on their behalf.

That the plaintiffs herein apparently therefore are subject to the various penalties provided above upon their failure to pay the excise tax assessment. The imposition of such penalties, in the case of Allen vs. Regents, 304 U.S. 439, was held to be those extraordinary circumstances which justify resort to equity.

Affiant states that the defendants in this case seek to make a distinction on the sales made by the plaintiffs to dealers, on the ground that such a sale contemplates a further re-sale by the dealer. In further answer to this contention in the affidavit of William H. Martin, it is specifically alleged that in many instances, on sales made by the plaintiffs to the dealers, especially to the used car dealers, the dealers themselves were the owners of the cars. (Page 5, line 29, Affidavit of William H. Martin in Reply to Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction). This identical issue was made before the United States Treasury

Department by the Automobile Glass Dealers of Southern California, in which they contended that glass sold to a dealer as distinguished from sales made [126] to the retail customers, should not be subject to the excise tax and that there should be no distinction between a consumer and a dealer.

That attached hereto, marked Exhibit "B", is a copy of a letter addressed to Mr. Paul R. Rioth, President of the Harbor Area Auto Glass Dealers, signed by Charles J. Valaer, Deputy Commissioner of the office of the Commissioner of Internal Revenue, rendering an official rule that a sale to any patron of a glass shop, whether a consumer or a dealer, is exempt from excise tax.

That the acts of the defendants in this case, wherein they seek to impose a tax on sales made to dealers of custom made seat covers while at the same time exempting from excise tax glass sold to dealers, is a denial of the equal protection of the laws and of the Fourteenth Amendment, as applied to these plaintiffs. That the cases in support of those principles of law are set forth in the plaintiffs' Points and Authorities being filed concurrently herewith.

/s/ PHILL SILVER

Subscribed and sworn to before me this 30th day of December, 1954.

[Seal] /s/ ARTHUR J. CROWLEY,
Notary Public in and for said
County and State [127]

EXHIBIT "A"

A. A. Alvarado, H. S. Austin, C. L. Barlow, John H. Belk, Earl H. Belk, Jimmy S. Benway, Charles E. Barga, Chester W. Bollinger, Fred Buckles, G. Byland, Bert Buckmaster.

George Correa, Angelo Conforti, E. W. Cheadle, K. J. Charles, D. L. Crocker, Rod Curet.

R. Durbin and Marvin Castellan, W. S. Daniels, Chester Z. Diemer, Lillian Domrose.

Jess D. Elliott, Fred Fauth, Pat. H. Filbin, Albert Garca, Jules Goldfaden, H. C. Geargain, Arthur Gonzalez, Joe T. Grounds, Henry C. Gutsch.

Warren J. Hawkes, Russell C. Hockensmith, Ina J. Herring, Herman's Furniture & Uph., Howard Gelborn, Kenneth W. Houston, John A. Jones, Kenneth C. Keyes, Oliver Kieffer, Andrew Klein, G. Koch.

Keith C. Lissner, Howard Laurain, Eugene L. Lessner, Sam Latt, Edw. P. Lauer.

W. H. Martin, R. F. Moata, M. T. Menzie, Herbert A. Merkel, Geo. W. McGrath, Junius N. Martin, Edgar G. Metcalf, Larry J. Meyers.

Stanley P. Nelson, Donald E. Norton, Alec Palott, Jim Perkins, Ed. Rourman and Norman Pine, Ray's Auto Upholstery Shop, W. A. Robinson.

Carl B. Scofield, [128] Ken Sorensen, Julian A. Smith, W. H. Scovel, David Senet, Jerry Stewart, Joe E. Stewart, C. W. Sutton.

Geo. H. Thomas, D. V. Whitman, John Whitlatch, Aubrey N. Wills, Verona Winters, Michael Wagner, Albert J. Wernli, Carl R. Yeaman. [129]

EXHIBIT "B"

(Copy)

U. S. Treasury Department, Washington 25

Office of Commissioner of Internal Revenue
Address reply to Commissioner of Internal Revenue and refer to ExT:ST:MH

Mr. Paul R. Rioth
President, Harbor Area Auto Glass Dealers
1331 Junipero Avenue
Long Beach 4, California

Dear Mr. Rioth:

Further reference is made to the question raised by you as to the application of the manufacturers' excise tax imposed by section 3403(c) of the Internal Revenue Code to orders received by glass dealers for automobile glass cut by them to automotive pattern.

Published ruling S. T. 928 (1943 Cumulative Internal Revenue Bulletin), pertaining to the taxability of glass cut to automobile patterns, stated in part as follows:

"It is now held that sales by the manufacturer or producer of glass cut to automobile patterns are subject to tax under section 3403(c) of the Internal Revenue Code, as amended, whether sold for stock or for installation in an automobile under immediate repair. Where, however, in connection with an immediate repair job, the glass is cut to automobile pattern pursuant to a customer's order and is installed by the person who cut such glass, the tax does not attach for the reason that the transaction

is deemed to be one involving the sale of labor and material and not the sale of an automobile part or accessory."

In various unpublished rulings issued subsequent to S. T. 928, the term "customer" as used in S. T. 928 was defined as meaning "consumer" or "individual owner" and that in ascertaining tax due this definition of the word "customer" should be applied to all transactions arising since S. T. 928 was published in June, 1943. It was on the basis of this application of S.T. 928 that the tax assessments against glass dealers were proposed.

It now appears that the great majority of glass dealers interpreted the term "customer" to mean any and all persons for whom glass was cut to automotive pattern and installed by the dealers.

After further study, it is concluded that the restricted meaning given to the word "customer" in unpublished rulings issued since the publication of S. T. 928 is unwarranted. Instead, it should be considered applicable to any patron of the glass dealer, without distinguishing between consumers and dealers or others engaged in business. It is further concluded that a proper application of the [130] manufacturers' excise tax on automobile parts does not warrant changing the word "customer", as used in S. T. 928, to more restricted language which might have the effect of taxing transactions in which the glass dealer both cuts and installs replacement glass in automobiles under immediate repair pursuant to individual orders from patrons such as repair shops, automobile dealers and insurance companies.

The taxability of transactions involving automobile glass may be measured by the rule, as stated in S. T. 928, that if the glass dealer both cuts and installs the replacement glass in an automobile under immediate repair no excise tax liability arises. On the other hand, a taxable transaction occurs if he merely cuts the glass to automobile pattern either before or after receipt of an order and uses it to fill an order which contemplates that someone other than himself or his employees will install the glass in the frame of the automobile windshield, door or window.

The pending reports recommending assessment of tax against glass dealers in the Long Beach, Wilmington and San Pedro, California area will be reexamined and acted on in accordance with the Bureau's letter.

Very truly yours,

/s/ Charles J. Valaer
Deputy Commissioner [131]

Acknowledgment of Service attached. [132]

[Endorsed]: Filed December 31, 1954.

[Title of District Court and Cause.]

AFFIDAVIT OF JUNIUS W. MARTIN

State of California,
County of Los Angeles—ss.

Junius W. Martin, being first duly sworn, deposes and says:

That he is one of the plaintiffs in the above entitled case. That there has been served upon him a notice of a proposed assessment for excise taxes for custom made to order seat covers made by him for new and used car dealers prior to August 18, 1952, in the sum of $2,700.00.

Your affiant states that he did not collect any portion of the excise tax in question; that he does not have the funds to pay these excise taxes. That he had been led to believe that there was no excise tax chargeable on custom made to order seat covers, whether [133] made for dealers or for retail customers. That your affiant is not a manufacturer, but that all seat covers made by him were individually made on a custom made to order basis and installed on the respective cars for which the seat covers were made.

That if the defendants would enforce payment of this tax against affiant, such enforcement would destroy his business and inflict loss upon him, for which he would have no adequate remedy at law.

/s/ JUNIUS W. MARTIN

Subscribed and sworn to before me this Dec. 30, 1954.

/s/ PHILL SILVER,
Notary Public in and for said County and State

Acknowledgment of Service attached. [134]

[Endorsed]: Filed Jan. 3, 1955.

[Title of District Court and Cause.]

FIRST AMENDED COMPLAINT FOR INJUNCTION TO RESTRAIN ASSESSMENT OR COLLECTION OF EXCISE TAXES

Come now the plaintiffs above named and for a first cause of action against the defendants, and each of them, allege as follows:

I.

That the plaintiff Martin's Auto Trimming, Inc., during all of the time hereinafter mentioned was and still is a corporation, organizing and existing under and by virtue of the laws of the State of California, with its principal place of business in the Southern District of California.

II.

That the plaintiff Martin's Auto Trimming, Inc., brings this action on its own behalf and on behalf of all others similarly situated. That said persons number approximately 185, and it is [135] therefore

impracticable to bring them all before this Court. That the same legal questions are involved as to all members of this class. That all of the persons and firms hereinafter referred to are similarly situated. That the character of the relief sought is applicable to all of the persons hereinafter referred to. That a list of the names of some of the persons for whom this action is brought is attached hereto marked Exhibit "A", and made a part hereof as though herein fully set forth.

III.

That at all times herein mentioned plaintiffs, and each of them, were each engaged in the business of operating automobile upholstery shops located in the Southern Central District of the State of California. That plaintiffs, and each of them, were engaged in the making of custom made to order seat covers by individual design and measurement for the respective automobiles of their customers. That plaintiffs made and sold custom made to order seat covers to individuals and to new and used car dealers. That none of the plaintiffs herein made any seat covers by pattern during any time referred to in this complaint, and none of the plaintiffs stocked any ready made seat covers.

IV.

That the Collector of Internal Revenue of the United States Treasury Department, acting through his agents, has heretofore notified the plaintiffs and their attorney that the plaintiffs, and each of them,

are liable for an excise tax of 8% of the gross amount of all sales of automobile seat covers, manufactured and sold by them between the year 1932 to and including August 18, 1952, to new and used car dealers.

V.

That the defendants are now threatening to assess and collect a tax from the plaintiffs and all other automobile upholstery shop owners in this district and in the State of California for any [136] automobile seat covers manufactured and sold by them to new and used car dealers prior to August 18, 1952, and to enforce against them such penalties as provided by law should they fail to pay said excise tax immediately.

VI.

That the defendants have made a proposed assessment of an excise tax against plaintiff's firm for the manufacture and sale by them of custom made seat covers for the period August 1, 1950 to August 31, 1952, in the sum of $11,917.73. That a number of other auto upholstery shop owners for whom this action is being brought have received notice of proposed taxes to be assessed against them and others have been notified by the defendants that the defendants propose to assess a tax against them in a large sum of money for custom made to order auto seat covers manufactured and sold by them to new and used car dealers for the period 1932 to August 18, 1952.

VII.

That the plaintiff Martin's Auto Trimming, Inc., alleges that it and the other auto upholstery shops for whom this class action is brought will suffer irreparable injury and damage unless given relief against the enforcement of the tax assessments, as many of them are unable to pay the tax. That many of the trim shop owners will, in fact, be forced to close their businesses if the defendants insist upon immediate payment of the aforementioned tax.

VIII.

That none of the plaintiffs have collected any excise tax from their customers for the period mentioned hereinabove for any custom made seat covers made by them during this period of time.

IX.

That many of the plaintiffs herein, as a result of their [137] failure to have collected any excise tax from their customers are now without sufficient funds of their own to pay these taxes at this time. That many of the plaintiffs would be subjected to oppression and injustice in that they would actually be forced to close down and liquidate their business if defendants insist upon payment of the tax, inasmuch as they actually do not have the funds to pay such a tax at this time.

X.

That the equity jurisprudence of this Court is invoked to prevent a multiplicity of suits by such

of the auto upholstery shop owners who may under threat of levy and seizure of their business, borrow the money to pay the tax. That if these plaintiffs are required to pay the tax and are compelled to resort to a Court of law to recover the amount so paid, the business of this Court will be obstructed by the number of cases of the same character.

XI.

Section 3403 of the Internal Revenue Code of the United States, upon which the defendants rely for the assessment of the tax against plaintiffs, provides in part as follows: "There shall be imposed upon the following articles sold by the manufacturer, producer or importer, a tax equivalent to the following percentages of the price for which so sold; (c) parts or accessories (other than tires and inner tubes) for any of the articles enumerated in subsection (a) or (b), 2 per centum."

XII.

That Section 3403(a) refers to automobile truck chassis, automobile truck bodies and tractors and, Section (b) refers to other automobile chassis and bodies and motorcycles (including in each case parts or accessories therefor sold or in connection therewith or with the sale therewith except tractors, 3%. A sale of an automobile shall, for the purposes of this subsection, be considered to be a sale of the chassis and of the body. [138]

XIII.

Section 316.2 of the Internal Revenue Code reads:

"The taxes on the sale or use of articles covered by these regulations were originally imposed by title 4 of the Revenue Act of 1932." The applicable provisions of the Revenue Act of 1932 were superseded effective March 1, 1939 by provisions of the Internal Revenue Code.

XIV.

That Section 3403(c) was amended in 1951 to provide for a tax of 8 per centum up to and including April 1, 1954.

XV.

That the defendants have interpreted accessories to include automobile seat covers.

XVI.

That between the period of 1932, the effective date of the Revenue Act of 1952, and until the 18th day of August, 1952, the defendants herein, by and through their duly authorized officials, acting within the scope and course of their employment with the defendants, did make and issue a number of official regulations and opinions on various successive dates, both orally and in writing, to various of the plaintiffs, uniformly holding and stating that no excise tax attaches to any auto seat covers made by the plaintiffs if made by individual measurement and not by pattern, and without regard as to whether the seat covers were made and sold to either individuals or to new and used car dealers.

XVII.

That the aforesaid regulations and opinions were rendered by officials of the defendants while in the employ of the defendants and while acting within the limits of authority lawfully conferred upon them by the defendants and whose duty it was to interpret and enforce the excise tax laws concerning automobile seat covers.

XVIII.

That the plaintiffs, and each of them, in good faith at all [139] times herein mentioned relied upon these representations and opinions.

XIX.

That the aforementioned representations and opinions were made by these officials to the plaintiffs intending that the plaintiffs and each of them rely thereon. That plaintiffs did rely thereon, and in the operation by them of their respective business, did not include in any sales made by them any excise tax for any seat covers made to measure by them, whether made for individuals or for new or used car dealers for the period prior to August 18, 1952.

XX.

That plaintiffs were ignorant of defendants' intention to later assert for the first time on and after August 18, 1952, that the plaintiffs were to be subject to and liable for an excise tax retroactively on any automobile seat covers made by them for new or used car dealers, even though made

to measure and immediately installed and not placed in stock.

XXI.

On August 18, 1952, the defendants for the first time since the enactment of the Revenue Act of 1932 did issue and publish a notice stating that if a manufacturer furnishes material and makes automobile seat covers, whether according to pattern or by individually measured jobs, all sales of such seat covers would be henceforth taxable under Section 3403(c) of the Internal Revenue Code, as amended, notwithstanding any previous regulations by the defendants to the contrary.

XXII.

That the defendants are now seeking to impose upon plaintiffs, and each of them, payment of an excise tax for all automobile seat covers manufactured and sold by them on individually measured jobs and not out of stock on sales made to new or used car dealers prior to August 18, 1952. [140]

XXIII.

That by reason of the opinions and regulations issued by the defendants' officials, as aforesaid, the defendants are now estopped to assess a tax against plaintiffs for any automobile seat covers manufactured and sold by them to new or used car dealers prior to August 18, 1952, when such seat covers have been made to individual design and not by pattern and were immediately installed and not taken from stock.

XXIV.

That the amount in controversy herein exceeds the sum of $3,000.00.

XXV.

That Robert A. Riddell is the District Director of the Internal Revenue Service for the Southern District of California.

XXVI.

That unless injunctive relief will be granted plaintiffs will suffer irreparable injury and damage and they will be subjected to oppression and injustice.

XXVII.

This action arises under the Internal Revenue Code Title 26.

For a second, separate and distinct cause of action the plaintiffs allege as follows:

I.

Plaintiffs incorporate herein paragraphs I to XV inclusive of the first cause of action, with the same force and effect as if fully set forth herein, also paragraphs XXIV to XXVII.

II.

That over a period of twenty years the defendants herein consistently issue various opinions and regulations both oral and in writing to various of the plaintiffs, interpreting Section 3403 of the Revenue Act as applicable only to manufacturers of automobile [141] seat covers and who, in fact, man-

ufactured the seat covers by patterns and placed them in stock and in like manner held that this section did not apply to automobile upholstery shops who made seat covers by individual measurement immediately tailored to the respective automobile.

III.

That the plaintiffs, and each of them, are not manufacturers but are automobile upholsterers. Plaintiffs do not cut any material for seat covers by pattern, but each automobile seat cover job is individually tailored to the measurement of the automobile upholstery in each case.

IV.

That plaintiffs did not include in their selling price any part of the manufacturer's excise tax for any period prior to August 18, 1952, in the sale of automobile seat covers by them individually tailored by measurement and immediately installed in that they relied upon the rulings and opinions issued by the defendants.

V.

The predecessor of the defendants made and published an official regulation number 46, Article 36, also known as S.T. 582, which provides as follows: "Repairs on automobiles performed in a repair shop, such as painting, auto upholstery, changes in, or replacements of woodwork and repairs to fenders and bodies are deemed to be in the nature of general repair work rather than articles sold and

are not subject to tax under Section 606 of the Revenue Act of 1932."

VI.

The ruling aforementioned was a regulation promulgated according to statute and under the authority vested in the defendants. That subsequent to the publication by the Internal Revenue Department of the aforementioned regulation, various officials in the employ of [142] the defendants did thereupon interpret said regulation to exempt from the liability of an excise tax all automobile seat covers individually tailored by measurement to the respective automobiles and immediately installed, made by auto upholstery shops.

VII.

That the defendants, on August 18, 1952, made and issued a new regulation described as Regulation 46 (1940) Section 316.55 S.T. 944 reading as follows:

"76,339 ST 944—Excise Tax—sale of automobile seat covers by the manufacturer is taxable, including those produced according to individual design and measurement for the consumer—as to sales that were previously ruled non taxable the new ruling will not apply to sales prior to August 18, 1952 (See also 38,568)."

Application of the tax, imposed by Section 3403 (c) of the Internal Revenue Code, as amended, to the sale of automobile seat covers by a manufacturer who furnishes the material therefor and produces them for the consumer thereof according to

the individual design and measurement.

Section 3403(c) of the Code, as amended, imposes effective November 1, 1951, a tax of 8 percent on the sale by the manufacturer of parts or accessories for vehicles taxable under subsection (q) and (b) of section 3403 of the Code, as amended, except that on and after April 1, 1954, the rate of tax shall be 5 per cent. Seat covers for automobiles are considered to be parts or accessories within the meaning of section 3403(c) of the Code, as amended, and sales thereof by the manufacturer are subject to tax.

The Bureau has issued rulings heretofore, that the only circumstances under which the tax does not apply to sales of seat covers by a manufacturer, is where the seat covers are individually designed, cut, tailored and fitted by the manufacturer to the automobile belonging to the person who contracts for the performance of [143] such operation, and such person is the consumer of the seat covers. Such rulings provided, however, that the sale of seat covers, similarly produced, to a dealer in new or used automobiles is not a sale for consumption but one for resale, and that the tax attaches to the manufacturer's sales thereof.

Upon reconsideration of the matter, the Bureau is now of the opinion that where a manufacturer furnished the material and produces automobile seat covers for the consumer thereof, according to individual design and measurement, the sale by the manufacturer of such seat covers is taxable under Section 3403(c) of the Code, as amended, regard-

less of whether they are installed by the manufacturer or by other persons.

The Bureau has issued rulings, as stated above, that sales by a manufacturer of seat covers, produced according to individual design and measurements, to a dealer in new or used cars, are not considered sales for consumption, and are subject to tax. The taxability of such sales is not affected by the ruling herein, and tax continues to attach, as in the past to such sales.

Because of the past rulings of the Bureau concerning the non application of the tax to automobile seat covers which are produced according to individual design and measurement for the consumer thereof, it has been concluded that, under the authority contained in section 3791(b) of the Code, the ruling set forth herein relating to seat covers so produced will not be applied retroactively with respect to sales of such seat covers prior to the date of this bulletin, except that any tax which has been paid on the sale of such seat covers will not be refunded, unless in particular case it is established to the satisfaction of the Commissioner, as required under Section 344 (d) of the Code, that the manufacturer, by reason of relying on an existing ruling that the sale of seat covers so produced was not taxable, did not include in his price any part of the manufacturers' excise tax which he *made* have subsequently paid on the [144] sale (S.T. 944 1952-17-13906).

VIII.

That in the aforementioned regulation the de-

fendants have now prescribed that automobile seat covers made according to individual design and measurement will be subject to excise tax on and after August 18, 1952, but that said regulation will not apply to sales prior to August 18, 1952, made to consumers.

IX.

The defendants have now determined that only automobile seat covers individually designed, cut, tailored and fitted by the manufacturer to the automobile belonging to the person who contracts for the performance of such operation and when such person is the consumer of the seat cover, is to be exempt from any excise tax prior to August 18, 1952, but that any auto seat covers made by plaintiffs for new or used car dealers, even though individually made to design and measurement were and are, nevertheless, subject to excise tax.

X.

That many of the plaintiffs in this action, including plaintiff Martin's Auto Trimming, Inc., are primarily engaged in making seat covers and other upholstery work for new and used car dealers rather than the general retail trade, although they do in fact, do work for both. That there are many auto upholstery shops who cater only to retail customers and do not render any work for new or used car dealers.

XI.

That the determination of August 18, 1952, S.T. 944, that auto seat covers tailored to measure by

individual design and sold to the person who contracts for the seat covers is not subject to a tax retroactively but that such sales are subject to excise tax on sales made on and after August 18, 1952, and that auto seat covers made by individual design and not by pattern for a dealer in new or used automobiles is subject to an excise tax retroactively prior to [145] August 18, 1952, was arrived at by the defendants by fundamental wrong principles and is arbitrary and confiscatory and constitutes a denial of the equal protection of the law as provided for by the Fourteenth Amendment of the Constitution of the United States, by exempting the tax on sales to retail customers when the retail customer personally contracts for the purchase of the seat covers, but applying the tax on such sales if the sale is arranged by or made through a new or used car dealer, and likewise applying the tax on used cars owned by the dealer, and not ordered for resale.

XII.

That in those instances where the plaintiffs have made seat covers for new car dealers, which is the subject matter of this proceeding, invariably the dealer has in the first instance already sold the automobile in question to a retail customer and has either as an inducement to the customer to purchase said automobile or by way of a separate sales transaction made the necessary arrangements with the plaintiffs to make and install a set of seat covers for the automobile purchased by the retail customer from them. That in this connection the new or

used car dealer is simply acting as an agent for the retail customer and, in fact, in many instances the retail customer himself appears at the place of business of the plaintiffs and selects the materials from which the seat covers are to be made. That there is, in fact, therefore, no reasonable basis upon which to distinguish a sale to a retail customer when such sale is arranged through a new and used car dealer or when the retail customer appears in person at plaintiff's place of business and makes all the necessary arrangements and the purchase himself. That practically all sales of seat covers for dealers in used cars are not for resale but are to cover up soiled or torn upholstery. That there is no reasonable basis upon which to distinguish a sale to a retail customer and a sale to a used car dealer. In these instances the used car dealer is the consumer no less than the retail customer. [146]

XIII.

That the determination exempting those automobile upholstery shops from the payment of an excise tax for automobile seat covers individually made by them for the retail consumer directly of the seat covers and in turn holding that the plaintiffs who are engaged in making automobile seat covers for new or used car dealers, as aforesaid, are subject to an excise tax is a denial of the equal protection of the law and is in violation of the Fourteenth Amendment to the Constitution of the United States.

For a third, separate and distinct cause of action, plaintiffs allege as follows:

I.

Plaintiffs incorporate herein paragraphs I to XV and XXIV to XXVII of the first cause of action, with the same force and effect as if fully set forth herein.

II.

That the plaintiffs all of the time herein mentioned were not manufacturers, producers or importers of automobile seat covers; but are automobile upholsterers, in the same category as a custom made to order tailor shop. That they do not use any patterns, such as are customarily used by automobile seat cover manufacturers. That each seat cover made by them is made to order by individual design and is tailored to the upholstery of the respective automobile. That each seat cover is individually cut, tailored and fitted by the plaintiffs to the automobile upholstery and immediately installed. That section 3403 of the Internal Revenue Code of the United States upon which the defendants rely for the assessment of a tax against the plaintiff is applicable to accessories manufactured and sold by manufacturers, producers or importers. That the plaintiffs herein and each of them, are neither manufacturers, producers or importers of automobile seat covers. That the transactions in which these [147] plaintiffs are engaged is one involving the sale of labor and material and not the

sale of an accessory within the meaning of said section.

For a fourth, separate and distinct cause of action, plaintiffs allege as follows:

I.

Plaintiffs incorporate herein paragraphs I to XV and XXIV to XXVII of the first cause of action, with the same force and effect as if fully set forth herein.

II.

That heretofore a regulation was made by the defendants, known as Regulation 46, S.T. 928, holding that glass cut to automobile pattern pursuant to a customer's order, if installed by the person who cuts such glass, that the excise tax will not attach for the reason that the transaction is deemed to be one involving the sale of labor and material and not the sale of an automobile part or accessory.

III.

That the determination that automobile seat covers made by individual pattern and designed and installed by the person who makes the same are subject to excise tax and is not one involving the sale of labor and material as was determined by Regulation 46 S.T. 928, when applied to glass for automobiles, is discriminatory and arbitrary and is a denial to the plaintiffs of the equal protection of the laws afforded by the Fourteenth Amendment of the Constitution of the United States, in that it discriminates against the plaintiffs

on the identical method of operation in favor of shop owners engaged in the business of selling and installing glass on automobiles for retail customers and new and used car dealers.

For a fifth, separate and distinct cause of action, the plaintiffs allege as follows: [148]

I.

Plaintiffs incorporate herein paragraphs I, II, III, XI, XII, XIII, XIV, XV, XXIV, XXV, XXVI and XXVII of the first cause of action, with the same force and effect as if fully set forth herein.

II.

On August 18, 1952, the defendants did issue and publish a notice stating that if a manufacturer furnishes material and makes automobile seat covers, whether according to pattern or by individual measured jobs, and whether made for the consumer or new or used car dealers, all sales of such seat covers would be henceforth taxable under Section 3403(c) of the Internal Revenue Code, as amended.

III.

That over a period of twenty years the defendants herein consistently issued various opinions and regulations, both oral and in writing, to various of the plaintiffs, interpreting section 3403 of the Revenue Act as applicable only to manufacturers of automobile seat covers and who, in fact, manufactured the seat covers by patterns and placed them in stock and in like manner held that this

section did not apply to automobile upholstery shops who made seat covers by individual measurement immediately tailored to the respective automobile.

IV.

That the plaintiffs are not manufacturers, producers or importers of automobile seat covers but are automobile upholsterers. They do not use any patterns such as are customarily used by automobile seat cover manufacturers. That each seat cover made by them is made by individual design and is tailored to the upholstery of the respective automobiles. That each seat cover is individually cut, tailored and fitted by the plaintiffs to the automobile upholstery and immediately installed.

V.

That Section 3403(c) of the Internal Revenue Code of the [149] United States, upon which the defendants rely for the payment of a tax is applicable to accessories manufactured and sold by manufacturers, producers or importers. That the plaintiffs herein, and each of them, are neither manufacturers, producers or importers of automobile seat covers. That the transactions in which these plaintiffs are engaged is one involving the sale of labor and material and not the sale of an accessory, within the meaning of said section.

VI.

Section 3448 of the Internal Revenue Code provides for penalties of 6% per annum from the time

when the tax became due until paid. Section 3612 provides for a penalty of 25% of the amount of the tax in case of any failure to make and file a return within the time prescribed by law, or in lieu thereof, additional penalties of 5% for each additional 30 days, or fraction thereof, not to exceed 25%. Section 2707 provides that any person who fails to pay, collect, and pay over the tax shall, in addition to other penalties provided by law, be liable to a penalty of the amount of the tax not paid. Section 316.95 provides that any person who wilfully fails to pay any tax due, file or return is subject to a fine of $10,000.00, or imprisonment, or both.

VII.

That in order to prevent the imposition of penalties and subject themselves to prosecution, the plaintiffs have, since August, 1952, paid over to the defendants an excise tax of 8% of the selling price for all custom made to order automobile seat covers sold by them.

VIII.

This suit is filed on behalf of the plaintiff William H. Martin, doing business as Martin's Auto Trimming, Inc., and on behalf of approximately 185 automobile upholstery shop owners similarly situated as the plaintiff. That all of said upholstery shop owners are in the same status and condition as the plaintiff Martin's Auto [150] Trimming, Inc. That all of the plaintiffs have contributed to the expense of this litigation and are directly interested therein. That the plaintiffs, and each of them, will

suffer irreparable damage unless given relief by this Court against the enforcement by the defendants of the aforementioned excise tax. That thousands of transactions are affected each day upon which the defendants claim payment of an excise tax from the plaintiffs. The plaintiffs invoked the equity jurisprudence of this Court to prevent a multiplicity of suits. That the plaintiffs do not have an adequate remedy at law.

For a sixth, separate and distinct cause of action, the plaintiffs allege as follows:

I.

Plaintiffs incorporate herein paragraphs I, II, III, XI, XII, XIII, XIV, XV, XXIV, XXV, XXVI and XXVII of the First Cause of Action with the same force and effect as if fully set forth herein. Plaintiffs also incorporate paragraphs II, III, IV, V, VI, VII and VIII of the Fifth Cause of Action with the same force and effect as if fully set forth herein.

II.

That heretofore a regulation was made by the defendants, known as Regulation 46, S.T. 928, holding that glass cut to automobile pattern pursuant to a customer's order, if installed by the person who cuts such glass, that the excise tax will not attach for the reason that the transaction is deemed to be one involving the sale of labor and material and not the sale of an automobile part or accessory.

III.

That the determination that automobile seat covers made by individual pattern and design and installed by the person who makes the same are subject to excise tax and is not one involving the sale of labor and material as was determined by Regulation 46, S.T. 928, when applied to glass for automobiles, is discriminatory and arbitrary and is a denial to the plaintiffs of the equal protection of the laws [151] afforded by the Fourteenth Amendment of the Constitution of the United States, in that it discriminates against the plaintiffs on the identical method of operation in favor of shop owners engaged in the business of selling and installing glass on automobiles for retail customers and new and used car dealers.

Wherefore, plaintiffs pray judgment for a decree of this Court that the defendants and each of them, their agents, servants, employees and attorneys, be perpetually enjoined and restrained from the collection of any excise tax levied and assessed by the defendants against the plaintiffs, or any of them, for automobile seat covers made by them either prior or subsequent to August 18, 1952, which they have designed, cut, tailored and fitted to the automobiles and immediately installed, on sales made to new or used car dealers or consumers.

That the defendants be decreed by a mandatory order of this Court to pay back the tax which has been collected by the defendants to the persons who paid the same, in the event such payment has been

made at the time of the trial of this case. In the meanwhile and during the pendency of this action, a temporary injunction be granted commanding the defendants and each and everyone of them, their agents, servants, employees and attorneys, to absolutely desist and refrain from assessing or proceeding with the assessment or from collecting or attempting to collect any and all taxes levied or assessed by the Collector of Internal Revenue Department against the plaintiffs or either of them, for custom made-to-order seat covers made and sold by them to new and used car dealers either prior or subsequent to August 18, 1952, or to the direct consumer thereof, or from collecting, or attempting to collect the tax mentioned and described in this complaint, and from enforcing or attempting to enforce the same in any way whatever, and for such further judgment in the premises as may be just and equitable, including costs of suit.

/s/ PHILL SILVER,
Attorney for Plaintiffs [152]

Duly Verified.

Membership List of California Association of Auto Trim Shops attached.

Affidavit of Service by Mail attached. [162]

[Endorsed]: Filed Jan. 21, 1955.

[Title of District Court and Cause.]

SUPPLEMENTARY AFFIDAVIT IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

United States of America,
Southern District of California—ss.

Alvin A. Underhill, being first duly sworn, deposes and says:

Reference is made to my affidavit of December 1, 1954, heretofore executed and filed herein on December 1, 1954, and hereby incorporated by reference.

Affiant further deposes and says: That at no time did affiant state to Phill Silver that he had received instructions from Washington to undertake an audit on all trim shops in this area, to determine what sales had been made to dealers and to make [163] assessments against all such trim shops and that he would have to proceed with these audits. In addition, affiant states that he received no such instructions from Washington.

Your affiant states that he never informed Phill Silver that he had no authority to sustain objections to the tax and that he intended to make an assessment regardless of the objections Phill Silver may disclose to him. On the contrary, your affiant held open to Phill Silver and his client the opportunity for informal conference which, although only for a period of ten days, was postponed better than two months to permit the plaintiff to compile facts

which were never presented to your affiant; that instead of availing themselves of their administrative remedies, counsel and plaintiff filed this action.

/s/ ALVIN A. UNDERHILL,
Affiant

Subscribed and sworn to before me this 7th day of February, 1955. Edmund L. Smith, Clerk U.S. District Court, Southern District of California.

[Seal] /s/ By MAXINE LEWIS,
Deputy [164]

Acknowledgment of Service attached. [165]

[Endorsed]: Filed Feb. 7, 1955.

[Title of District Court and Cause.]

AFFIDAVIT OF RICHARD LAMBETH

State of California,
County of Los Angeles—ss.

Richard Lambeth, being first duly sworn, deposes and says:

That he is one of the plaintiffs in the above entitled case. That there has been served upon him a notice of a proposed assessment for excise taxes for custom made to order seat covers made by him for new and used car dealers prior to August 18, 1952, in the sum of $2,003.14.

Your affiant states that he did not collect any

portion of the excise tax in question; that he does not have the funds to pay these excise taxes. That he had been led to believe that there was no excise tax chargeable on custom made to order seat covers, [166] whether made for dealers or for retail customers. That your affiant is not a manufacturer, but that all seat covers made by him were individually made on a custom made to order basis and installed on the respective cars for which the seat covers were made.

That if the defendants would enforce payment of this tax against affiant, such enforcement would destroy his business and inflict loss upon him, for which he would have no adequate remedy at law.

/s/ RICHARD LAMBETH

Subscribed and sworn to before me this 29th day of December, 1954.

[Seal] /s/ PHILL SILVER,
Notary Public in and for said County and State. [167]

Affidavit of Service by Mail attached. [168]

[Endorsed]: Filed Feb. 10, 1955.

[Title of District Court and Cause.]

MOTION TO STRIKE

Come now the defendants above named and through their attorneys, Laughlin E. Waters, United States Attorney, Edward R. McHale, As-

sistant United States Attorney, Chief, Tax Division, and Eugene Harpole, Special Attorney, Internal Revenue Service, move to strike the following:

1. The inclusion of "William H. Martin" and "on behalf of itself and others similarly situated" in the caption of plaintiffs' First Amended Complaint.

2. The inclusion of all references to any parties as parties plaintiff in this action other than Martin's Auto Trimming, Inc.

3. The affidavits of any parties whose affidavits have been filed herein by plaintiffs, other than those of plaintiff Martin's Auto Trimming, Inc., and of counsel for plaintiff. [169]

4. The membership list of California Association of Auto Trim Shops attached to plaintiffs' First Amended Complaint.

Defendant's motion is based on the following grounds:

1. Plaintiff alleges in paragraph 1 of Count 1 of its First Amended Complaint that Martin's Auto Trimming, Inc. is a corporation organized and existing under and by virtue of the laws of the State of California. William H. Martin has failed to show any interest in the cause alleged to exist in favor of Martin's Auto Trimming, Inc., except through his association with the corporation and is, therefore, an improper party plaintiff.

2. Plaintiff Martin's Auto Trimming, Inc. has failed to set forth specifically the identity of other parties against whom assessments are proposed to be made. Any other parties are, therefore, improperly joined as plaintiffs.

3. Many of the parties attempted to be joined with plaintiff are residing and do business in a locality outside the jurisdiction of defendant Robert A. Riddell, District Director of Internal Revenue for the Southern District of California. In no event could assessments be made by defendant against these parties.

Dated: This 21st day of February, 1955.

LAUGHLIN E. WATERS,
United States Attorney
EDWARD R. McHALE,
Assistant U.S. Attorney
Chief, Tax Division
EUGENE HARPOLE,
Special Attorney,
Internal Revenue Service
/s/ By EUGENE HARPOLE,
Attorneys for Defendants [170]

Affidavit of Service by Mail attached. [171]

[Endorsed]: Filed Feb. 21, 1955.

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes now T. Coleman Andrews as the duly appointed, qualified and acting Commissioner of Internal Revenue, and appearing specially and for himself alone and for no other defendant, and moves the Court that this action be dismissed as to him upon the ground and for the reason that the

Court lacks jurisdiction over the person of the Commissioner of Internal Revenue, whose official situs and legal domicile as Commissioner of Internal Revenue, is in the District of Columbia.

This motion is based upon the papers, records and files of the action. The memorandum of points and authorities filed herein on December 1, 1954, in opposition to plaintiff's motion for a preliminary injunction is here adopted by said T. Coleman Andrews as his memorandum [174] of points and authorities in support of this motion to dismiss as to him.

Dated: This 21st day of February, 1955.

LAUGHLIN E. WATERS,
United States Attorney
EDWARD R. McHALE,
Assistant U.S. Attorney
Chief, Tax Division
EUGENE HARPOLE,
Special Attorney
Internal Revenue Service,
Attorneys for Defendants [175]

Affidavit of Service by Mail attached. [178]

[Endorsed]: Filed Feb. 21, 1955.

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes now the defendant Robert A. Riddell, as Director of Internal Revenue for the Los Angeles, California, District, and appearing specially and for himself alone and for no other defendant, and moves the Court that the above-entitled action be dismissed

1. For lack of jurisdiction over the subject matter; and

2. For failing to state a claim upon which relief can be granted on the ground and for the reason that its maintenance is prohibited by Section 7421(a) of the Internal Revenue Code for 1954 (Section 3653(a) I.R.C., 1939).

This motion is based upon the records and files of the case, and the defendant, Robert A. Riddell, adopts the Government's memorandum of points and authorities in opposition to plaintiff's motion for preliminary injunction, which memorandum was filed on [181] December 1, 1954, as his memorandum of points and authorities in support of this motion.

Dated: This 21st day of February, 1955.

LAUGHLIN E. WATERS,
United States Attorney

EDWARD R. McHALE,
Assistant U.S. Attorney
Chief, Tax Division

EUGENE HARPOLE,
Special Attorney
Internal Revenue Service,
Attorneys for Defendants [182]

Affidavit of Service by Mail attached. [183]

[Endorsed]: Filed Feb. 21, 1955.

[Title of District Court and Cause.]

SUPPLEMENTAL MEMORANDUM OF THE DEFENDANT IN SUPPORT OF MOTIONS TO DISMISS AND IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

Preliminary Statement

Pursuant to the request of the Court, defendant, Robert A. Riddell, Director of Internal Revenue, files this memorandum with respect to the administrative procedures available to the plaintiff for conferences with respect to the proposed assessment of manufacturers' excise taxes in the office of the Audit Division of the Director of Internal Revenue at Los Angeles, and in the Appellate Division of the Internal Revenue Service at Los Angeles.

Regulations and Rulings

Title 26, Code of Federal Regulations, Section 601.4(a) to Section 601.4(d), inclusive, as amended, 17 Fed. Reg. 6949, July 30, 1952, Cumulative Pocket Supp., 26 C.F.R., 1954, pp. 226-229.

Commissioner's Mimeograph, Coll. No. 6756, January 9, 1952 (unpublished).

* * * * * [184]

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney

EDWARD R. McHALE,
Assistant U. S. Attorney, Chief,
Tax Division

/s/ EDWARD R. McHALE,
Attorneys for Defendant, Robert A. Riddell [187]

TREASURY DEPARTMENT
Office of Commissioner of Internal Revenue
Washington 25, D. C.

Com.-Mimeograph
Coll. No. 6756
R. A. No. 1887
A. S. No. 701

January 9, 1952

Procedure Relating to the Examination, Processing and Closing of Excise Tax Cases

OFFICERS AND EMPLOYEES OF THE
INTERNAL REVENUE SERVICE CONCERNED:

Purpose

1. The purposes of this mimeograph are to prescribe certain new or revised procedures incident to the provisions of Com.-Mim. Coll. No. 6755, R. A. No. 1886, A. S. No. 700, effective January 20, 1952; to establish the areas within which the Collectors of Internal Revenue, Internal Revenue Agents in Charge, and Excise Tax Division will exercise jurisdiction over excise taxes; and to prescribe instructions, pursuant to the provisions of Com.-Mim. Coll. No. 6453, dated December 16, 1949, whereby Collectors will schedule for abatement, credit, or refund, certain allowances, provided the amount of the adjustment (exclusive of interest, penalties, additions to the tax, and additional amounts) for the taxable period, or other basis on which the particular excise tax being adjusted is determined under the provisions of the Code, does not exceed $10,000.

JURISDICTION OF COLLECTORS, INTERNAL REVENUE AGENTS IN CHARGE AND EXCISE TAX DIVISION IN RESPECT OF EXCISE TAXES

Agents' Offices

2. Investigations of taxpayers' liabilities for the following excise taxes will be under the jurisdiction of Agents' offices if the income tax return of the taxpayer is under the Agents' examination jurisdiction:

Type of Tax	Return Form No.	Code Section	Group Code Chapter	Regulations
(a) Any liquid sold or used as a fuel in diesel-powered highway vehicles	725	2450	2 20	119
(b) Manufacturers' sale or use of:				
Matches	726	3409	2 29	44
Gasoline, etc.	726	3412	2 29	44
Lubricating oil	726	3413	2 29	44

(over)

EXHIBIT A

Type of Tax	Return Form No.	Code Section	Code Chapter	Regulations
(c) Collected taxes on:				
Use of safe deposit boxes	727	1850	1 12	42
Telegraph, cable, or radio dispatches	727	3465	1 30	42
Local and long distance telephone messages, etc.	727	3465	1 30	42
Transportation of persons	727	3469	1 30	42
Transportation of property, including coal	727	3475	1 30	113
(d) Incurred tax on:				
Transportation of oil by pipe line	727	3460	2 30	42
(e) Manufacturers' sale or use of:				
Pistols and revolvers	728	2700	3 25	47
Rubber tires and inner tubes	728	3400	2 29	46
Automobile trucks, tractors, etc.	728	3403(a)	3 29	46
Other automobiles, motorcycles, etc.	728	3403(b)	3 29	46
Automobile and motorcycle parts and accessories	728	3403(c)	3 29	46
Radio and television sets, phonographs, etc.	728	3404(a)	3 29	46
Components for such sets, etc.	728	3404(b)	3 29	46
Phonograph records	728	3404(c)	3 29	46
Musical instruments	728	3404(d)	3 29	46
Household type mechanical refrigerators, quick freezers, air conditioners, etc.	728	3405	3 29	46
Sporting goods and fishing tackle	728	3406(a)(1)	3 29	46
Electric, gas and oil appliances	728	3406(a)(3)	3 29	46
Cameras, lenses, film, and photographic apparatus	728	3406(a)(4)	3 29	46
Business and store machines	728	3406(a)(6)	3 29	46
Electric light bulbs and tubes	728	3406(a)(10)	3 29	46
Firearms, shells and cartridges	728	3407	3 29	46
Mechanical pencils, fountain pens, ball point pens, mechanical lighters	728	3408	3 29	46
Electrical energy	728	3411	3 29	46
(f) Retailers' sales of:				
Jewelry	728-A	2400	4 19	51
Furs	728-A	2401	4 19	51
Toilet preparations	728-A	2402	4 19	51
Luggage	728-A	1651(a)	4 9A	51
(g) Collected taxes on:				
Admissions to theatres, concerts, etc.	729	1700(a)	1 10	43
Leases of boxes or seats	729	1700(b)	1 10	43
Club dues and initiation fees	729	1710(a)	1 10	43

EXHIBIT A

Exhibit A—(Continued)

(h) Cases involving (1) an overassessment with or without the disallowance of a claim for refund, or (2) no change in tax liability with the disallowance of a claim for refund, which are non-agreed after conference in the Agent's office will be forwarded upon written request from the taxpayer to the Appellate Staff for a hearing.

(i) Cases involving additional tax which were non-agreed in the Agent's office and sent to the Collector's office for assessment and subsequently returned to the Agent's office with a claim for abatement associated which raises no new issues or presents no important new evidence, will be forwarded to the Appellate Staff for a hearing. If new issues or important evidence are presented in the claim for abatement, due consideration will be given thereto by the Agent's office and, if necessary, the case will be transferred to the Appellate Staff for a hearing.

Technical Questions To Be Referred To Bureau

26. Technical questions as to taxability of articles and sales, or other matters, which are not free from doubt and which cannot be resolved by the Collector or the Internal Revenue Agent in Charge on the basis of the law, regulations, or a clearly applicable precedent ruling issued by the Bureau will arise while cases are in examination, review, or conference status. The Collector or the Internal Revenue Agent in Charge should communicate directly with the Excise Tax Division in Washington,

Exhibit A—(Continued)

attention ExT:DC, for advice on any question on which no clear precedent is available as to the taxability or tax classification of any transaction, or as to the fair market price or the reasonable pipeline transportation charge fixed by the Commissioner, before completing action on the case.

[Marginal note written in longhand]: This paragraph cited in par. 7 of Supp'l. No. 2.

Procedure Before the Appellate Staff

27. The cases to be considered by the Appellate Staff will be limited to overassessment cases with or without a claim for refund and cases where abatement claims have been filed with respect to which the Internal Revenue Agent in Charge and the taxpayer have been unable to reach any agreement as to the disposition to be made thereof. No case will be referred to the Appellate Staff for appellate consideration, however, unless and until the taxpayer files a written request with the Internal Revenue Agent in Charge or, where applicable, files a claim for abatement with the Collector. Except with the approval of the Head of the Appellate Staff, no case will be accepted in any Appellate Staff office from the office of any Internal Revenue Agent in Charge not within the geographical jurisdiction of the said Appellate Staff office. [190]

28. On receipt in a field office of the Appellate Staff of a case from the office of an Internal Revenue Agent in Charge, an appropriate card record will be made thereof. Until experience has demon-

Exhibit A—(Continued)

strated generally what kind of a record card will be the most satisfactory, the Appellate Staff will utilize any record cards, plain or otherwise, now available at its field offices.

29. As promptly as practicable after a case is received at a field office of the Appellate Staff, it will be assigned to a Staff conferee who will arrange with the taxpayer for a mutually satisfactory date for a conference.

30. From this point on, the procedure before the Appellate Staff will be similar to that now prescribed for the handling of income, estate and gift tax cases in the pre-ninety-day status. The taxpayer will be afforded reasonable opportunity to present his objections to the conclusions of the Internal Revenue Agent in Charge in his case and the Staff conferee will consider those objections thoroughly in the light of all the information of record.

31. In the event an agreement as to the amount of tax liability is reached, the taxpayer will be asked to execute an agreement of finality subject to acceptance by the District Head. Until experience has demonstrated the form of agreement which could be expected to prove the most satisfactory, the form of agreement to be used will be left to the discretion of the District Head. In general, however, and to the extent appropriate, it should follow the type of agreement now used by the Appellate Staff in income tax cases.

32. Whether or not an agreement as to tax liability is reached with the taxpayer, the conferee,

Exhibit A—(Continued)

on concluding his deliberations, will prepare an Action Memorandum and Supporting Statement similar, insofar as appropriate, to the memoranda now being prepared by the Appellate Staff in income tax cases. Such memoranda will set forth the issues raised, all the pertinent facts concerning them, the conferee's conclusions and his recommended "Decision." The recommended "Decision" should be reflected clearly and precisely in the Action Memorandum in order that the case thereafter may be processed correctly and in accordance therewith.

33. The Conferee's recommendations will be subject to review by the Technical Advisor in Charge of the field office where the case is considered or by a Special Assistant to the District Head, and thereafter to approval by the District Head. In the event an agreement as to tax liability is reached with the taxpayer, the District Head, on approval of the Conferee's recommendations, will note his "Acceptance" on the agreement form hereinbefore mentioned, and the date of his acceptance. [191]

34. The final action taken at a field office of the Appellate Staff will be recorded on the record card of the case and thereupon the entire file, inclusive of the finally approved recommendation of the Appellate Staff, will be returned to the Internal Revenue Agent in Charge from whom the case was received.

35. The procedure as to post review of cases handled by any field office of the Appellate Staff

Exhibit A—(Continued)

will be the same as the post review procedure of the Appellate Staff in income, estate and gift tax cases.

Disposition of Cases Received From Appellate Staff

36. Upon receipt in the office of the Internal Revenue Agent in Charge of a case file with the Appellate Staff's approved recommendation as to the action to be taken, the case will be processed, closed and disposed of in the same manner as is provided in paragraph 25 for cases closed by the Internal Revenue Agent in Charge and not referred to the Appellate Staff.

Selection, Investigation, Review, Etc.—Collector's Offices

37(a) The procedure prescribed herein for Agents' offices will, to the extent applicable, be followed by Collectors' offices in the management and disposition of cases under the Collectors' examination jurisdiction pending issuance of more specific instructions to Collectors' offices.

(b) Attention is called to the taxpayer's privilege of requesting a conference in the Agent's office on any case which is non-agreed after conference in the Collector's office and a hearing before the Appellate Staff in the event agreement is not reached after conference in the Agent's office.

Post Review of Examined Cases by Excise Tax Division

38(a) All examined cases, including claims al-

Exhibit A—(Continued)

lowed on survey as provided in paragraph 17, closed by the offices of Collectors of Internal Revenue and Internal Revenue Agents in Charge will, after all necessary processing required to be made in the field offices, be forwarded to the Bureau in Washington, attention ExT:DC, for such review as will promote uniformity of audit action in all field districts, except cases involving the taxes listed below:

(1) Collected taxes on admissions to theatres, concerts, etc., imposed by section 1700(a) of the Internal Revenue Code. [192]

* * * * *

Affidavit of Service by Mail attached. [193]

[Endorsed]: Filed March 4, 1955.

[Title of District Court and Cause.]

MEMORANDUM FOR ORDER

The Complaint is in six alleged causes of action.

The last five causes of action are clearly an effort to plead a cause of action under the Declaratory Relief Act, which just as clearly cannot lie, under the provisions of Section 2201 of Title 28, United States Code, which excepts controversies with respect to Federal taxes. Beeland vs. Davis, (C.C.A. 5, 1937) 88 F.2d 447, cert. den. 300 U.S. 680; Scaife vs. Driscoll, (C.C.A. 3, 1937) 94 F.2d 664, cert. den. 305 U.S. 603.

The Motion to dismiss these causes of action must be granted.

It is difficult to tell whether or not the first cause of action is one for declaratory relief. It does seek an injunction to restrain further proceedings on the proposed [202] assessment of tax, and attacks the validity of the tax. In any event, such an action is prohibited by Section 7421 of Title 26, United States Code.

The Court recognizes that that Section is not a complete bar, but finds no exceptional circumstances alleged in plaintiffs' complaint which would bring the cause of action attempted to be set forth therein within the exceptions to the rule. Particularly is this so in view of the fact that the plaintiffs have not exhausted the administrative remedies provided by the Internal Revenue Regulations (26 CFR 6014 et seq, 1954 Supp.).

The Court does not reach either the question as to whether or not it has jurisdiction of the Commissioner of Internal Revenue, or the question as to whether or not this is a proper class action, as the action must be dismissed for the reasons hereinbefore set forth.

Defendants will prepare, serve, and submit an appropriate judgment of dismissal in accordance with the foregoing.

Dated: Los Angeles, California, this 13 day of May, 1955.

/s/ PEIRSON M. HALL,
U. S. District Judge [203]

[Endorsed]: Filed May 13, 1955.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON DENIAL OF PRELIMINARY INJUNCTION

Plaintiffs' Motion for Preliminary Injunction in the above-entitled action having come on for hearing before the Court at Los Angeles, California, on February 28, 1955, before the Honorable Peirson Hall, District Judge, plaintiffs appearing by Phill Silver, their attorney, and the defendants appearing by Laughlin E. Waters, United States Attorney and Edward R. McHale, Assistant United States Attorney, Chief, Tax Division; the matter having been argued and submitted on the pleadings, memoranda of authorities, affidavits, and the Court, after having considered the memoranda, the pleadings, and the affidavits, and being duly advised and on May 13, 1955, having filed its Memorandum for Order, now makes the following: [204]

Findings of Fact

I.

Plaintiff Martin's Auto Trimming, Inc., at all times herein concerned, was and is a corporation organized and existing under and by virtue of the laws of the State of California, with its principal place of business in the Southern District of California.

II.

Plaintiff, Martin's Auto Trimming, Inc., was engaged in the business of operating an automobile

upholstery shop in the Southern District of California and was engaged in the making of seat covers for the automobiles of its customers which were sold to individuals and to new and used car dealers. The Commissioner of Internal Revenue proposed an assessment of manufacturers' excise tax against plaintiff, Martin's Auto Trimming, Inc., for the manufacture and sale by said plaintiff of custom-made seat covers for the period August 1, 1950 to August 31, 1952 in the sum of $11,917.73. There is a dispute between the plaintiff, Martin's Auto Trimming Inc., and the Internal Revenue Service with respect to the question of whether the sales of seat covers made by the plaintiff to its customers were subject to the manufacturers' excise tax under Section 3403 of the Internal Revenue Code of 1939, as amended.

III.

This action allegedly was brought by plaintiff Martin's Auto Trimming, Inc., on behalf of itself, William H. Martin, an individual, and 184 other businesses located within the Southern Judicial District of California allegedly similarly situated.

IV.

The District Director of Internal Revenue for the Los Angeles District of California has only 12 cases where tax audits have been made to determine whether a manufacturer who makes or sells seat covers is liable for additional excise taxes imposed by the provisions of Section 3403(c) of Internal Revenue Code of 1939, as amended. [205]

V.

On August 18, 1954, notice of a proposed adjustment of manufacturers' excise tax in the amounts and for the periods alleged in paragraph II hereinabove, was given to the plaintiff Martin's Auto Trimming, Inc., in Los Angeles, California, and said plaintiff was afforded the right to present its objections to the proposed assessments at an informal conference in Los Angeles which could be requested within ten days following the receipt of the notice of the proposed assessments. By letter to the Director of Internal Revenue, dated August 20, 1954, plaintiff, Martin's Auto Trimming, Inc., requested that its right to a conference be extended for a period of 30 days, which request was granted by the Director. On September 14, 1954, plaintiff again requested, and was granted, a 30-day extension for such a conference. On October 22, 1954, plaintiff again requested, and was granted, a postponement of the conference to October 29, 1954. On October 29, 1954, plaintiff again requested, and was granted, a postponement of the conference to November 4, 1954. This action was instituted by plaintiff Martin's Auto Trimming, Inc., on October 29, 1954, filing a complaint and seeking a preliminary injunction and permanent injunction restraining the assessment and collection of these taxes against plaintiff and 184 other persons allegedly similarly situated.

VI.

On October 29, 1954, plaintiff filed a complaint for injunction verified by William H. Martin, an

alleged plaintiff and president of the plaintiff, Martin's Auto Trimming, Inc., which alleged, in paragraph VII thereof, "That the plaintiff Martin's Auto Trimming, Inc., alleges that it and the other auto upholstery shops for whom this class action is brought will suffer irreparable injury and damage unless given relief against the enforcement of the tax assessments, as many of them are unable to pay the tax without great financial hardship to the continued safe operation of their businesses."

VII.

That in an affidavit filed together with motion for preliminary injunction on October 29, 1954, the affiant, William H. Martin, president of Martin's Auto Trimming, Inc., at pages 12 and 13, stated "that in order for him [Martin] to pay this tax he would actually be forced to mortgage his home."

VIII.

Under regulations promulgated by the Secretary of the Treasury incorporated in the Title 26, Code of Federal Regulations, plaintiff, Martin's Auto Trimming, Inc., was entitled to full administrative hearing prior to assessment of the tax; that after assessment of the tax and prior to payment thereof or collection thereof, it could file a claim for abatement, which filing would defer the collection of the tax or the administrative collection by the Director of Internal Revenue until it had been disposed of; that plaintiff failed to exhaust its administrative remedies.

V.

On August 18, 1954, notice of a proposed adjustment of manufacturers' excise tax in the amounts and for the periods alleged in paragraph II hereinabove, was given to the plaintiff Martin's Auto Trimming, Inc., in Los Angeles, California, and said plaintiff was afforded the right to present its objections to the proposed assessments at an informal conference in Los Angeles which could be requested within ten days following the receipt of the notice of the proposed assessments. By letter to the Director of Internal Revenue, dated August 20, 1954, plaintiff, Martin's Auto Trimming, Inc., requested that its right to a conference be extended for a period of 30 days, which request was granted by the Director. On September 14, 1954, plaintiff again requested, and was granted, a 30-day extension for such a conference. On October 22, 1954, plaintiff again requested, and was granted, a postponement of the conference to October 29, 1954. On October 29, 1954, plaintiff again requested, and was granted, a postponement of the conference to November 4, 1954. This action was instituted by plaintiff Martin's Auto Trimming, Inc., on October 29, 1954, filing a complaint and seeking a preliminary injunction and permanent injunction restraining the assessment and collection of these taxes against plaintiff and 184 other persons allegedly similarly situated.

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Under regulations promulgated by the Secretary of the Treasury incorporated in the Title 26, Code of Federal Regulations, plaintiff, Martin's Auto Trimming, Inc., was entitled to full administrative hearing prior to assessment of the tax; that after assessment of the tax and prior to payment thereof or collection thereof, it could file a claim for abatement, which filing would defer the collection of the tax or the administrative collection by the Director of Internal Revenue until it had been disposed of; that plaintiff failed to exhaust its administrative remedies.

IX.

The first amended complaint in each and every cause of action thereof is for declaratory relief and attacks the validity of a Federal tax.

X.

There are no exceptional circumstances alleged shown by the pleadings and affidavits on file which would bring the cause or causes of action attempted to be set forth in the first amended complaint within the exceptions to the rule prohibiting injunctions against the assessment and collection of federal taxes.

XI.

Plaintiffs may pay one or more of the proposed assessments, file a claim for refund, and in the event of its denial by rejection or inaction, sue the Government or the Director in the United States District Court or the Government in the United States Court of Claims and thus secure an adjudication of the merits of the controversy in [207] an orderly process.

And from these Facts, the Court concludes as follows:

I.

This is an action seeking to restrain the assessment and collection of Internal Revenue taxes and is prohibited by Section 7421 of the Internal Revenue Code of 1954.

II.

There are no exceptional circumstances which

would except this case from the provisions of either Title 28, Section 2201 of the United States Code, the Declaratory Relief Act, or Section 7421 of the Internal Revenue Code of 1954.

III.

Plaintiffs would not suffer irreparable injury and are not in such exceptional circumstances as to render inadequate their remedies at law; mere difficulty in raising the money to pay the taxes, or having to borrow the money is not enough.

IV.

Plaintiffs have failed to exhaust administrative remedies available to them.

V.

The relief sought is in the nature of declaratory relief with respect to Federal taxes and is barred by Title 28, United States Code, Section 2201.

VI.

Defendants are entitled to order denying motion for preliminary injunction.

VII.

Plaintiffs have an adequate remedy at law and are not entitled to equitable relief or an injunction. [208]

VIII.

Whether or not this is a proper class action is immaterial to the decision denying a preliminary in-

junction, particularly in view of the concurrent judgment dismissing this action, and the Court specifically declines to pass on the now unnecessary question raised by defendants' Motion to Strike.

Dated: August 15, 1955.

/s/ PEIRSON M. HALL,
U. S. District Judge [209]

[Endorsed]: Lodged Aug. 9, 1955. Filed Aug. 17, 1955.

In the United States District Court for the Southern District of California, Central Division

No. 17411-PH

WILLIAM H. MARTIN, Etc., Plaintiffs,

vs.

T. C. COLEMAN ANDREWS, Etc., et al., Defendants.

JUDGMENT AND ORDER DISMISSING ACTION

The defendant's, Robert A. Riddell's, Motion to Dismiss the above entitled action and each and every cause of action thereof on the grounds (1) that the Court lacks jurisdiction over the subject matter of the first amended complaint and each and every cause of action thereof, and (2) that said complaint and causes of action failed to state a claim upon which relief can be granted and (3) for

the further reason that its maintenance is prohibited by Section 7421(a) of the Internal Revenue Code of 1954, came on regularly for hearing before the Court at Los Angeles, California, on February 28, 1955, before the Honorable Peirson Hall, Judge; plaintiffs appeared by Phill Silver, their attorney, and the defendants appeared by Laughlin E. Waters, United States Attorney, and Edward R. McHale, Assistant [210] United States Attorney, Chief, Tax Division; the matter was argued and submitted on the pleadings and memoranda of authorities; and the Court, after having considered the memoranda and the pleadings and the files, and having on May 13, 1955, filed its Memorandum for Order, finds and concludes that the motion to dismiss the above entitled action and each and every cause of action of the First Amended Complaint for Injunction to Restrain Assessment or Collection of Excise Taxes must be granted because they fail to state a claim upon which relief can be granted and the Court lacks jurisdiction over the subject matter thereof for the reason that the last five causes of action are clearly an effort to plead a cause of action under the Declaratory Relief Act [28 U.S.C. §2201] and is prohibited by the exception therein with respect to controversies as to federal taxes; and the first cause of action is likewise prohibited by said section as well as by Section 7421 of Title 26, United States Code, the Internal Revenue Code of 1954; and that further, the plaintiffs have failed to exhaust the administrative remedies provided by the Internal Revenue regulations,

Title 26, Code of Federal Regulations, Sections 6014 et seq., 1954 Supp.; and that they have an adequate remedy at law, to pay the tax and sue for refund.

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed:

1. This action and each and every cause of action thereof may be, and the same is, hereby dismissed with prejudice as to each and every defendant.

2. That the defendant, Robert A. Riddell, have judgment for his costs to be taxed by the Clerk of the Court in the sum of $20.00.

Dated: August 16, 1955.

/s/ PEIRSON M. HALL,
U. S. District Judge [211]

Affidavit of Service by Mail attached. [212]

[Endorsed]: Lodged Aug. 9, 1955. Filed Aug. 17, 1955. Entered Aug. 18, 1955.

[Title of District Court and Cause.]

ORDER DENYING PRELIMINARY INJUNCTION

Plaintiffs' Motion for Preliminary Injunction in the above-entitled action having come on for hearing before the Court at Los Angeles, California, on February 28, 1955, before the Honorable Peirson Hall, District Judge, plaintiffs appearing by Phill Silver, their attorney, and the defendants appear-

ing by Laughlin E. Waters, United States Attorney and Edward R. McHale, Assistant United States Attorney, Chief, Tax Division; the matter having been argued and submitted on the pleadings, memoranda of authorities, affidavits, and the Court having heretofore made and filed its Memorandum for Order, its Findings of Fact and Conclusions of Law, and it appearing to the Court said motion for preliminary injunction restraining the assessment and collection of manufacturers' excise tax against Martin's Auto Trimming, [213] Inc., and others similarly situated should be denied.

It Is Hereby Ordered, Adjudged and Decreed, that the plaintiffs' Motion for Preliminary Injunction may be, and is, hereby denied.

Dated: August 15, 1955.

/s/ PEIRSON M. HALL,
U. S. District Judge [214]

[Endorsed]: Lodged Aug. 9, 1955. Filed Aug. 17, 1955. Entered Aug. 18, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the defendants above named and to Laughlin E. Waters:

Notice Is Hereby Given that the plaintiff, William H. Martin, doing business as Martin's Auto Trimming, Inc., on behalf of itself and others sim-

ilarly situated, hereby appeals to the United States Court of Appeals, Ninth Circuit, from the Judgment and Order dismissing plaintiffs' action, and from the Order denying the plaintiff a Preliminary Injunction entered in this case on August 18, 1955.

/s/ PHILL SILVER,
Attorney for Plaintiffs and
Appellants [215]

[Endorsed]: Filed September 8, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 224, inclusive, contain the original

Complaint;

Points and Authorities;

Motion for Preliminary Injunction;

Affidavit of W. H. Martin, Rubie Gilbert and Louis Lampert;

Order to Show Cause;

Memorandum in Opposition to Plaintiff's Motion for Prelim Injunction;

Affidavit of W. H. Martin in Reply to Deft's Opposition, etc.;

Affidavits of Eugene L. Lessner and Kenneth Sorensen;

Plaintiffs' Points and Authorities in Reply to Defendants' Points, etc.;

Affidavit of Phill Silver in Reply to Defendants' Opposition;

Affidavit of Junius W. Martin;

First Amended Complaint;

Supplementary Affidavit in Opposition to Motion for Preliminary Injunction;

Affidavit of Richard Lambeth;

Motion to Strike;

Notice of Hearing on Motion to Dismiss and Motion to Dismiss;

Notice of Hearing on Motion to Dismiss and Motion to Dismiss;

Supplemental Memo of Defendant in Support of Motions to Dismiss, etc.;

Plaintiff's Reply to Defendants' Supplemental Memo of defendant;

Memorandum for Order;

Findings of Fact and Conclusions of Law;

Judgment and Order Dismissing Action;

Order Denying Preliminary Injunction;

Notice of Appeal;

Notice to the Clerk;

Defendants' Additional Designation of Record on Appeal;

Affidavit and Order for Extension of Time; constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in said cause.

I further certify that my fees for preparing the foregoing record amount to $2.00, which sum has been paid by appellant.

Witness my hand and the seal of said District Court, this 17th day of November, 1955.

[Seal] JOHN A. CHILDRESS,
Clerk

/s/ By CHARLES E. JONES,
Deputy

[Endorsed]: No. 14949. United States Court of Appeals for the Ninth Circuit. William H. Martin, doing business as Martin's Auto Trimming, Inc., on behalf of itself and others similarly situated, Appellant, vs. T. C. Coleman Andrews, as the duly appointed and acting Collector of the Internal Revenue Service of the United States, and Robert A. Riddell, as Director of the Internal Revenue Service for the Southern District of California, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: November 21, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14949

WILLIAM H. MARTIN, etc., et al.,
Plaintiff and Appellant,

vs.

T. C. COLEMAN ANDREWS, etc., et al.,
Defendant and Respondent.

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY

(a) The United States District Court erred in determining that it lacked jurisdiction over the subject matter alleged in the First Amended Complaint;

(b) The court erred in determining that the causes of action failed to state a claim for injunctive relief;

(c) The court erred in determining that plaintiff's cause of action is prohibited by Section 7421 (a) of the Internal Revenue Code;

(d) The Court erred in determining that the appellant was required to first exhaust administrative remedies;

(e) The Court erred in determining that the appellant had an adequate remedy at law, to wit, to pay the tax and sue for the refund;

(f) The assessment of an excise tax may be restrained by injunction notwithstanding the positive

statutory prohibition of Section 3653 of the Internal Revenue Code;

(g) Section 3224 of the Revised Statutes prohibiting injunctive action to restrain assessment or collection of a tax, is not applicable where the taxing agent does not have jurisdiction to levy the tax as distinguished from errors or irregularity or other defects which are not jurisdictional;

(h) An action for an injunction will lie to restrain the collection of a tax, even though the taxpayer has not exhausted other administrative remedies;

(i) Where the enforcement of an illegal tax would lead to a multiplicity of suits, a class action to restrain the collection of a tax will lie;

(j) The Collector of Internal Revenue may be barred by a waiver or estoppel from assessing the tax;

(l) A change in governmental usage cannot be made retroactive.

Dated this 28th day of November, 1955.

/s/ PHILL SILVER,
Attorney for Plaintiff and
Appellant

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 30, 1955. Paul P. O'Brien, Clerk.